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IDENTIFIERS	*Colorado; Program Exit; Surrogate Parents

ABSTRACT

This document contains six inserts for the Colorado Administrative Decisions Notebooks, a compilation of all Colorado Special Education Administrative Decisions issued in 1992, including all Impartial Hearing Officer Decisions, State Level Review Decisions, and Federal Complaint Findings. The full text of each decision is preceded by a case summary which includes a listing of key topics, a statement of the issues, the decision and highlights of the decision, and highlights of the discussion. Topics covered in the compilation as a whole include: procedural safeguards, due process hearings, extended school year, discipline (suspension and expulsion), free appropriate pubic education, residential placement, private schools, least restrictive environment, student evaluation, confidentiality of information, related services, individual education plans, attorney fees, surrogate parents-guardian ad litem program, HIV (human immunodeficiency virus) and other health-related issues, qualified instructional personnel, infants and toddlers and other preschool handicapped concerns, graduation and exit, and transitional programming. An index listing the decisions and findings by key topics is provided. The six cases contained in this volume are evenly divided between Impartial Hearing Officer Decisions and Federal Complaint Findings. Cases concern many, but not all, of the issues cited in the index. (DB)

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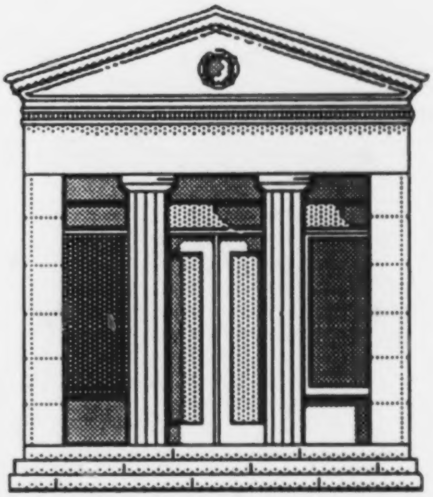
COLORADO SPECIAL EDUCATION ADMINISTRATIVE DECISIONS



Impartial Hearing Officer Decisions

State Level Review Decisions

Federal Complaint Findings

EC 302272

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MEMORANDUM

TO: Directors of Special Education, Hearing Officers, and Other Interested Parties

FROM: Fred Smokoski and Cheryl Karstaedt

RE: Colorado Special Education Administrative Decisions Notebooks

DATE: April 27, 1993

¶¶

Enclosed please find inserts for the Administrative Decisions Notebooks for 1992 and subsequent years. The inserts enclosed are as follows: L92:105, L92:115, S92:115*, L92:116, 92:505, 92:506, and 92:508.

**S92:115 - Due to the incorrect case number placed on the original set during printing, this section divider (marked with lilac color sheet) will be mailed at a later date.*

COLORADO
SPECIAL EDUCATION ADMINISTRATIVE DECISIONS
1993

William T. Randall
Commissioner of Education
State of Colorado

Fred Smokoski
Director
Special Education Services Unit

Cheryl Karstaedt
Federal Complaints Officer

Colorado State Board of Education
1993

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Introduction

Colorado Special Education Administrative Decisions contains all Impartial Hearing Officer Decisions, State Level Review Decisions, and Complaint Findings issued in 1992. The document is a resource tool for special education directors, impartial hearing officers, advocates, attorneys and others involved in assuring the provision of a free appropriate public education to children with disabilities in Colorado. Materials will be updated on a periodic basis by the Special Education Services Unit of the Colorado Department of Education.

The full text of each decision or finding is preceded by a case summary which includes a listing of key topics, a statement of the issues, the decision and highlights of the decision and highlights of the discussion. Additionally, an index is provided which lists the decisions and findings by key topics.

The documents are divided into due process and complaint documents. Within each section the documents are in numerical order based on the date a request for a due process hearing is made or a complaint is filed. Impartial Hearing Officer Decisions, State Level Review Decisions and any supplementary decisions on the same case are filed together. Impartial Hearing Officer decision numbers are designated with an "L", followed by the year of request and a number beginning with "100" that designates the chronological order in which the request was received by the Colorado Department of Education within a particular year, for example "L92:100". A State Level Review Decision in the case would contain the same number except be preceded by an "S", for example "S92:100." Complaint findings are listed by the year and a number beginning with "501" that designates the chronological order in which the complaint was filed with the Colorado Department of Education within a particular year, for example "92: 501".

It is intended that the materials contained in these volumes be used for information and guidance by those involved in the provision and administration of special education programs. The materials do not necessarily reflect the current administrative positions of the Colorado Department of Education.

March 18, 1993

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Case Number: L92:105

Status: Impartial Hearing Officer Decision

Key Topics:
Assessment
Independent Evaluations
Related Services (recreation, sex education)
Free Appropriate Public Education (FAPE)
Individual Education Plan (IEP)

Issues:

- Whether independent evaluations should be approved at District expense or whether the District's assessment was adequate.
- Whether student/teacher ratio is sufficient to provide FAPE.
- Whether to designate as a characteristic of service specific individuals and programs for recreational needs.
- Whether the goals as stated on the IEP are measurable.

Decision:

- Adequate evaluations have been administered by the District.
- Student is receiving educational benefit with a student/teacher ratio of 11:1.
- The District failed to provide assistance to reach recreational goals and must determine a specific program to fulfill the commitment.
- The goals on the IEP are measurable by law.
- The District must determine a specific program to fulfill the commitment to provide sex education.

Discussion:

- Denial of initial request for hearing by District.
- Legal requirements regarding assessments.
- Specificity requirement of short term objectives.
- Clarification that discussion should be not about whether a particular program would benefit a student but whether the student's program is reasonably calculated to provide educational benefit.

In the Matter of:	
COLORADO SPRINGS SCHOOL DISTRICT 11,	
Petitioner,	
	FINDINGS AND DECISION
v.	
	CASE NO. 92:105
R.R.,	
	Impartial Hearing Officer
By and through his mother,	Andrew J. Maikovich
Respondent and Counter-Claimant.	

I.

INTRODUCTORY STATEMENT

The hearing in the above-captioned matter was held at Wasson High School in Colorado Springs, Colorado on May 11, 12, 18 and 20, 1992. Jurisdiction is conferred by 20 U.S.C. Section 1450, 34 C.F.R. Section 300, et seq., and Part VII of the Colorado Department of Education State Plan. Colorado Springs School District Number 11 was represented by Caroleen Jolivet of Holme Roberts & Owen, 90 South Cascade Avenue, Ste. 1300, Colorado Springs, Colorado 80903. R.R. was represented by Julie Wolfe, 10 Boulder Crescent, Ste. 201, Colorado Springs, Colorado 80903.

The procedures leading to this hearing are somewhat confusing and at issue in the case. A Triennial assessment and Individual Educational Program (IEP) staffing was conducted with respect to R.R. on March 5, 1992. At the end of the staffing, R.R. and his natural mother, C.F., wrote "Request for hearing" after their signatures on the IEP. Their representative at the hearing, Rita Ague, listed four reasons for the request in a separate note carrying only her signature. The first reason involved a request for an independent assessment at District expense.

Ronald Hage, Director of Special Education in District 11, rejected the request for hearing on technical grounds. He rejected R.R.'s and C.F.'s request for lack of specificity because only their names appeared on the request without specific reasons. He rejected Ms. Ague's request because only her signature appeared on the page that listed the reasons. Mr. Hage contacted Ms. Ague by telephone and follow-up letter on March 6, 1992, informing her that he had requested the names of hearing officers, but that he would need a written statement that she was representing R.R. and his mother before he would grant a hearing.

By letter dated March 10, 1992, Mr. Hage contacted the Colorado Department of Education (CDE) and requested a hearing with respect to his denial of the independent assessment request. The letter was received and accepted by the CDE as the first request. By letter dated March 19, 1992, Julie Wolfe, representative for R.R. and C.F., requested that the CDE acknowledge R.R.'s and C.F.'s March 5, 1992, request written on the IEP. This request for a hearing was accepted by CDE as the second request.

The Impartial Hearing Officer (IHO) was formally notified of his appointment by letter dated April 9, 1992. The parties agreed to combine their hearing requests and have all issues heard by the present examiner. A three-day hearing was scheduled. The IHO extended the date for resolution of the hearing requests for good cause, which was agreed to by both parties. The hearing was extended to a fourth day when the previous estimate proved unattainable.

It should be noted that prior to the hearing, the parties settled an issue with respect to R.R.'s attempt to enroll in school during September 1991. Therefore, no evidence was presented at the hearing with respect to R.R.'s failure to attend school between September 1991 through February 1992 and no findings of fact or opinions are presented on this issue.

II.

FINDINGS OF FACT

The IHO makes the following findings of fact based upon the evidence presented at the hearing.

1. R.R. was born on August 13, 1972. He was diagnosed as a SLIC (Significantly Limited Intellectual Capacity) student in elementary school and has been placed in special education programs throughout his educational years.

2. R.R. was prescribed the drug Ritalin from approximately age 5 until age 18.

3. R.R. has had a history of attention disorder but not hyperactivity or anxiety.

4. In 1984, R.R. was sexually molested by a boyfriend of C.F., R.R.'s natural mother. He received psychological treatment shortly after the incident was discovered. R.R. is presently guarded about discussing this experience.

5. During the first week of February 1992, R.R. went to the home of Rita Ague and asked her to help him enroll in school. R.R. was a friend of Ms. Ague's son while he was at Palmer High School in 1988. She had not seen R.R. in over a year's time.

6. Ms. Ague immediately called Cathy Dawson, department chairperson for special education, and informed her of R.R.'s desire to reenroll in school. She provided Ms. Dawson with R.R.'s address (since R.R.'s residence did not have a telephone).

7. Ms. Dawson contacted Jill Thomas, a special education teacher at Wasson High School, and informed her that R.R. wished to enroll.

8. Ms. Thomas contacted Ms. Ague by telephone and set up a meeting for R.R. on February 14, 1992.

9. A meeting was held between Ms. Thomas, Ms. Dawson, Ms. Ague and R.R. on February 14, 1992. There was a discussion about past schooling and the need for new assessments. R.R. stated that he had become sexually active with a 42-year-old mentally-handicapped woman who was three months pregnant (not by R.R.). R.R. informed the participants that the child was his, even though the woman had become pregnant prior to sexual relations with R.R. R.R. elected to return to school following completion of assessments.

10. On February 25, 1992, R.R. signed a form authorizing the Colorado Springs Public Schools Department of Instructions to evaluate his educational needs and perform the necessary assessments thereto.

11. As part of the assessments, District 11 psychologist Bryan Schmidt administered the WAIS-R and Bender-Gestalt intelligence tests to R.R. on March 2, 1992. During a more difficult portion of the Bender-Gestalt test, R.R. became upset and failed to complete that portion of the exam.

12. A review of R.R.'s present WAIS-R and Bender-Gestalt test results with previous test results administered since 1980 show a consistent pattern of responses. R.R. was diagnosed as being in the upper-end of the SLIC range. A one-page summary of R.R.'s present WAIS-R and Bender-Gestalt test results were provided to the IEP staff.

13. As part of the assessments, a Burk's Behavior Rating Test was performed with respect to R.R. also on March 2, 1992. R.R.'s behavior was rated for purposes of this test by C.F. and assessed by school social worker Julia Demanett. Compared to his 1988 Burk's test, C.F. rated her son as having greater problems with his attention span and being overexcited easily. Ms. Demanett discussed those changes with C.F. and determined no significant changes had taken place. C.F. also provided Ms. Demanett with a social developmental and health history of R.R.

14. As part of the assessments, R.R. was given the Woodcock-Johnson Psycho-Educational Battery on March 2, 1992. Examined by Jill Thomas, results of the test showed that R.R. had regressed in his math skills by approximately one year (further examination of the results would reduce the regression to approximately 6 months, which was reported in the IEP addendum). Test results showed improved reading skills. Ms. Thomas did not administer the general knowledge portion of the test to R.R.

15. As part of the assessments, R.R. was given a Celf-R language evaluation test on March 4, 1992. He was examined by speech therapist Nancy Ek, who also conducted a language sample test on R.R.

16. On March 5, 1992, special education work/study teacher Geri Ikola interviewed R.R. about his employment interests. R.R. indicated he was interested in landscaping, custodial or auto mechanic positions. R.R.'s assessment of himself as "good" in grooming, effort, attendance, enthusiasm and attitude/behavior was noted by Ms. Ikola as inaccurate.

17. On March 5, 1992, a Triennial IEP staffing was conducted. The student was represented by C.F., Rita Ague and himself. Wasson High School was represented by special education teacher Jill Thomas, special education supervisor Meredith Jobe, social worker Julia Demanett and transition teacher Deborah Kueck. (Ms. Kueck prepared a transition report for R.R.

during the meeting.) Special Education teacher Geri Ikola attended portions of the meeting. The staffing coordinator at Palmer High School, Linda Moffitt, was also in attendance at the request of the Wasson High School staff because R.R. had previously attended that school.

18. The staffing team was aware of R.R.'s job history, i.e., work in a nursing home and at Goodwill Industries. The staffing team had information that R.R. had a job coach at the nursing home and was in a sheltered workshop at Goodwill. The staffing team also was aware that R.R. worked in housekeeping, janitorial and laundry services at the nursing home and that he had "collated" at Goodwill Industries. The staffing team did not seek interviews or records regarding R.R.'s performance in those positions.

19. There was no discussion of R.R.'s previous employment or vocational abilities at the March 5, 1992 IEP staffing. There was no discussion of possible referral to area vocational programs at Goodwill Industries, Pikes Peak Community College or the University of Colorado at Colorado Springs. No specific job placement was discussed.

20. There was no information with respect to R.R.'s "learning style" (visual, auditory, etc.) at the time of the March 5, 1992 IEP staffing.

21. An Individual Transition Plan (ITP) was created for R.R. by Deborah Kueck at the same time as the March 5, 1992 IEP staffing.

22. A complete health assessment of R.R. was not conducted prior to the IEP staffing, which was noted on his IEP as a need. A school nurse would provide a health screening in mid-April prior to a diagnostic staffing on April 26.

23. C.F., R.R.'s natural mother, expressed concern during the IEP staffing about her son's attention span and mood swings. The IHO, however, finds that C.F. did not mention a 1988 incident in which she alleges that R.R. threatened her with a knife.

24. R.R. expressed an interest in the Special Olympics at the staffing. His interest was noted in the ITP but not the IEP.

25. Ms. Ague expressed her desire to have the Special Olympics placed on R.R.'s IEP as a characteristic of service. She expressed this interest at either the March 5 IEP staffing or the

April 27 diagnostic meeting.

26. Ms. Ague expressed concern about R.R.'s donating plasma twice a week. Neither R.R. nor his mother has expressed concern about his practice of donating plasma.

27. The two primary goals reached in the IEP were: 1) develop basic skills needed to function adequately in the community, and 2) explore realistic job possibilities. Longterm goals for R.R., unrebutted in testimony, are that R.R. learn to live independently and have the ability to seek competitive employment.

28. Near the completion of the March 5, 1992 IEP staffing, Rita Ague expressed concern about the adequacy of R.R.'s assessment and requested an independent assessment at District expense.

29. Meredith Jobe left the meeting and contacted Ronald Hage, Director of Special Education in District 11, by telephone informing him that an independent assessment had been requested. Ms. Jobe did not specifically discuss what assessments were presented at the meeting. She did inform Mr. Hage, however, that in the staffing team's opinion, adequate assessments had been performed.

30. Mr. Hage told Ms. Jobe that he was denying the request and that she should inform R.R., his mother and Ms. Ague that their request had been denied. Ms. Jobe so informed the individuals and completed the staffing.

31. Upon notification that their request had been denied, R.R. and his mother signed the IEP and wrote "Request for hearing" beside their names.

32. The staffing team unanimously endorsed the March 5, 1992 IEP.

33. Ms. Ague discussed the IEP with C.F. and R.R. and wrote a note to be placed with the IEP. In the note, she requested an impartial due process hearing based upon: (1) Failure of the staffing team to approve an outside evaluation, (2) Failure of the staffing team to designate a student/teacher ratio, (3) Failure of the district to designate as a characteristic of service specific individuals and programs to provide for R.R.'s recreational needs, and (4) Failure of the district to compensate R.R. for its failure to place him in school during the 1991-92 school year.

34. At the end of the March 5, 1992 IEP staffing, R.R. was presented with the option of starting school immediately or at the beginning of the next quarter. R.R. elected to begin attending the next quarter (March 30, 1992).

35. On March 6, 1992, Mr. Hage contacted Ms. Ague by telephone and denied R.R.'s request for a hearing. The reason provided for the denial was that only Ms. Ague's name appeared on the note that specifically stated the reasons for the hearing request and that Mr. Hage was uncertain that Ms. Ague represented R.R. and his mother. Ms. Ague referred Mr. Hage to R.R.'s and C.F.'s signatures on the IEP. Mr. Hage requested that Ms. Ague send him a confirmation letter stating that she was representing R.R. and C.F. at the IEP staffing and with respect to the request/explanation for a hearing. Ms. Ague never sent the confirmation letter.

36. Mr. Hage was aware that Ms. Ague previously represented a student without the knowledge or authorization of the student's guardians.

37. Mr. Hage contacted the Colorado Department of Education on March 6, 1992, and requested the names of hearing officers with respect to the first of the issues on Ms. Ague's note, i.e., an independent assessment of R.R. at district expense. Mr. Hage officially contacted the Colorado Department of Education on March 11, 1992 (by letter dated March 10, 1992), requesting a hearing on the issue of an independent evaluation.

38. Mr. Hage confirmed his denial of a hearing to Ms. Ague by letter dated March 6, 1992, requesting that she resubmit her request with all three signatures (Ms. Ague's, C.F.'s and R.R.'s). Mr. Hage also indicated that, because he believed a more technically correct request would be forthcoming, he had initiated a hearing.

39. R.R. began attending Wasson High School on March 30, 1992.

40. On April 16, 1992, nurse Sharon Hamann performed a health screening on R.R. This screening included a non-invasive examination of R.R., review of past school health records and a discussion of R.R.'s hygiene with Jill Thomas.

41. On or about April 21, 1992, R.R. was placed in a recycling position within Wasson High School. R.R. is paid $2.25 per hour and works at his job approximately 1.5 hours per day.

He is responsible for collecting and sorting recyclable materials from classrooms. He was required to interview three times for the position because of inappropriate attire at the first two scheduled interviews.

42. R.R. is scheduled to remain in his recycling position for 2.5 months (through the end of the school quarter).

43. On April 27, 1992, a staffing team was reconvened on R.R.'s behalf to discuss the additional diagnostic information gathered since March 5 (20-day diagnostic placement). The student was represented by C.F., Rita Ague, attorney Julie Wolfe and himself. Wasson High School was represented by Jill Thomas, Meredith Jobe, Deborah Kueck, Julia Demanett, Geri Ikola, Ronald Hage, speech therapist Nancy Ek, nurse Nancy Lupton and attorney Lee Jolivet.

44. Possible sex education programs for R.R. were discussed at the April 27 meeting. On the IEP addendum, Jill Thomas wrote that R.R. had a need for appropriate sexual practices. Ronald Hage told Ms. Thomas to remove "sexual practices" from the addendum because sex education is a need of all students, not just this particular individual. Ms. Thomas scratched "sexual practices" from the addendum and replaced it with "relationships."

45. It was unanimously determined by the staffing team that R.R.'s present program would continue through the rest of the quarter. This program included four educational blocks of approximately 1.5 hours each in the following areas: (1) work/study, (2) functional english/reading, (3) functional math, and (4) work (recycling job).

46. On May 4, 1992, psychologist Bryan Schmidt administered the Vineland Adaptive Behavior test to R.R. at the request of the District's legal representative. R.R. again tested in the upper-range for mentally retarded adults.

47. In R.R.'s IEP, a short-term objective is for R.R. to take part in at least two recreational activities in one year's time.

48. R.R. was told that the high school swimming pool was available to him in the mornings. He went to the pool one morning but has not returned.

49. R.R. has been provided with a free membership to the YMCA.

50. R.R.'s present instruction with respect to actual hands-on experience in the community is limited to trips to restaurants/stores approximately once every three weeks as part of his work-study block and occasional trips to a recycling center with his employment supervisor.

51. R.R. has not displayed angry or aggressive behavior in the classroom at Wasson High School.

52. R.R. has been provided a free lunch pass by the District.

53. To date, R.R. has never expressed a need or desire to receive sex education.

54. Wasson High School did not offer an Independent Living Skills class the spring quarter of 1992. Assorted training was provided to R.R. in a classroom setting.

55. It was anticipated that R.R. would work in a job this summer through the JTPA program. An extended school year has never been discussed.

III.

DISCUSSION

The first issue before the IHO is procedural. At the conclusion of the March 5, 1992 IEP staffing, both R.R. and C.F. wrote "Request for hearing," beside their signatures on the IEP. The reasons behind the request were written by R.R.'s representative, Rita Ague, on a separate sheet of paper under her signature. Neither R.R.'s nor C.F.'s signature appeared on the one-page note. According to the testimony of Ronald Hage, Director of Special Education in District 11, he denied the request for hearing by R.R. and C.F. because no explanation followed their request and he denied Ms. Ague's request because neither the student nor mother had signed Ms. Ague's note.

Mr. Hage did initiate a hearing on the first of four issues in Ms. Ague's note, however (the request for an outside evaluation of R.R. at District expense). He testified that he took this step because he believed the request only contained a mere technical deficiency that would be resolved shortly thereafter. He did not explain, however, why he believed only one of the four issues presented by Ms. Ague would be technically corrected.

On its face, it appears that the District's denial of a hearing to R.R. and C.F. was inappropriate. The Colorado State Plan for Fiscal Years 1992-94 (State Plan) requires directors of special education to conduct hearings when "initiated by a parent submitting a written request." State Plan VII(B)(1)(a). In addition, a student with disabilities who is 18 years of age, and has not been declared incompetent, may request a hearing. State Plan VII(B)(3)(a). It is uncontested that R.R., at 19 years of age, is qualified to request a hearing on his own behalf.

While there is no regulatory justification for the denial of a hearing on the basis of the petitioners' failure to sign on the note which listed the reasons for the request, the IHO nevertheless makes no finding with respect to this denial. In unrebutted testimony, Mr. Hage testified that he required R.R. or C.F. to confirm that Ms. Ague was representing their interests because Ms. Ague had represented another student in the past without the knowledge of that student's legal guardian. It becomes more reasonable to require confirmation when a misrepresentation has been made under similar circumstances in the past. The IHO finds that neither party comes to this hearing with totally clean hands in this respect. While the denial of Mr. Hage to request a hearing on all four of Ms. Ague's reasons created logistical difficulties for the parties and IHO, all issues were ultimately heard without detriment to the student. The IHO therefore declines to determine whether the District's denial of a hearing was correct or incorrect but anticipates both parties will act more appropriately in the future.

The other issues before the IHO are substantive in nature. The original request for a hearing on March 5, 1992, as noted by Ms. Ague, stated four issues on which the request was being made: "(1) Failure of the staffing team to approve outside evaluation at district expense, to evaluate needs, assess, etc. (2) Failure of staffing team to designate what constitutes a 'small group,' and student/teacher ratio. (3) Refusal of district administration representative to designate as a characteristic of service, what, how and who will provide recreational services and designate a particular delivery. (4) Refusal of district to compensate for district's failure to place R.R. during 1991-92 school year." (As previously noted, the fourth issue was settled by the parties prior to the hearing.)

After R.R. secured legal representation, the number of issues increased proportionally. While the IHO will address each issue individually, it is the IHO's opinion that the issues fall within two broad categories: (1) Has the District complied with the procedures set forth in the Individuals with Disabilities Education Act (IDEA) and state law in assessing R.R. and in preparing his IEP? and (2) Are the particular facets of R.R.'s IEP reasonably calculated to enable him to receive educational benefit? It is the determination of the IHO that the burden of proof with regard to issue number one resides with the District and that the burden with respect to issue number two resides with the student. R.R.'s representative argues that if the District fails to meet its burden with respect to the procedures used to assess R.R., it would retain the burden with respect to all other facets of the IEP. Because the IHO finds that the District did in fact comply with the procedures required of it by law, the argument becomes moot.

R.R. argues that the District failed to provide adequate assessments with regard to his Triennial review. The procedures required by the Colorado Department of Education with respect to the evaluation process are described in Section IX of the State Plan. In summary, the State Plan requires that a school district:

1. Provide varied tests and evaluations so that no single test or evaluation becomes the sole criteria for the determination of a handicapping condition or placement;
2. Insure that testing is not racially or culturally discriminatory;
3. Tests are administered by qualified professionals in each discipline;
4. Tests are administered in the native language of the student so that results of the tests do not discriminate on the basis of language;
5. The tests are validated for the purpose for which they are intended and are administered in accordance with instructions provided by the test procedures;
6. Whenever a child with impaired sensory, manual or speaking skills is evaluated, that the child's aptitude, achievement level or adaptive behavior be assessed rather than reflecting the child's impairment;
7. A multidisciplinary/multifaceted team provide the assessment with at least one individual of the team having knowledge of the suspected disability.

The Colorado Code of Regulations provides additional guidance with respect to a school district's responsibility in providing each child referred for possible enrollment in special education with an appropriate assessment. Assessment procedures required to protect the interests of the child include:

> 1. Certification, endorsement or CDE approval of personnel evaluating the students;
>
> 2. The evaluation instruments must minimize cultural bias;
>
> 3. Testing will be administered in the student's native language;
>
> 4. Qualified professionals will complete the assessment procedures appropriate for the condition, in the present case "Limited Intellectual Capacity." Mandatory tests include vision/hearing screening, educational assessment (including academic history, evaluation of educational environment, consideration of vocational and avocational needs and evaluation of current academic status), developmental history, adaptive behavior and psychological assessment. Recommended tests include health history and current health status, speech and language assessment and other agency information.

1 CCR 301-8, 2220-R-3.03.

As noted in the District's briefs, most of the factors with respect to R.R.'s assessments are not at issue. There is no allegation that the tests were culturally biased or not administered in the student's native language. The tests administered to R.R. were all validated for the purpose for which they were used. Clearly, a number of tests were administered to R.R., no one of which was relied on exclusively in making R.R.'s educational placement. The tests were varied, from the standardized (WAIS-R, Bender-Gestalt, Burk's, Woodcock-Johnson, Celf-R) to observation and interviews. The tests were administered by qualified, trained professionals. In fact, the IHO was particularly impressed with the strength of the IEP staff. Each of the examiners was knowledgable and, in most cases, had long-term experience with R.R.'s suspected disability, SLIC.

R.R.'s argument with respect to his assessments involves not the tests which were administered to him, but to tests which were not performed. In particular, R.R. alleges that testing was incomplete with respect to his present level of vocational skills, daily life skills and self-help skills. R.R. also apparently argues that only a full-scale physical examination, including blood tests, administered by a certified physician, would constitute an adequate assessment of R.R.'s health needs.

The basic issue with regard to R.R.'s assessments is, "How much testing is enough?" According to Colorado regulations, the assessment must be of "sufficient scope and intensity to determine the level of the child's handicap, if any, and to identify the nature of the child's special educational needs." 1 CCR 301-8, 2220-R-3.03(5). R.R. also cited Guidelines for the Assessment Process in Colorado, Colorado Department of Education, 1988, page 13, as requiring in a Triennial review, "a full re-examination and re-evaluation in all areas of functioning."

R.R. fails to state, however, specifically what additional tests he believes the School District should have administered. R.R. also fails to provide the statutory or regulatory basis behind his request for additional assessments. Therefore, the IHO will determine whether the District's assessments comply with the requirements delineated in the State Plan and the Colorado regulations previously cited. The IHO concludes that the assessments were adequate for the qualified professionals on the IEP staffing team to determine the level of R.R's handicap and to identify the nature of his special educational needs.

Specifically, R.R. alleges that his vocational skills were inadequately assessed. In particular, evidence produced at the hearing detailed the District's failure to obtain a work evaluation report from Goodwill Industries with respect to R.R.'s employment while attending Widefield High School in 1989-90. (It should be noted that no evidence was produced that an evaluation of R.R. was ever conducted by Goodwill Industries.) Members of the staffing team had interviewed R.R. with respect to his position at Goodwill Industries as well as interviewing him about vocational interests. The staffing team was aware of his job history through school records and discussions with Linda Moffitt, staffing coordinator at Palmer High School which R.R. had previously attended. Basically, no evidence was presented that R.R.'s assessments were inaccurate or that further assessments would change R.R.'s present vocational placement. In the absence of contradictory evidence, the IHO must defer to District personnel. Board of Educ. of the Hendrick Hudson Central School Dist.v. Rowley, 102 S.Ct. 3034 (1982), (Rowley).

R.R. also alleges that the District failed to provide him with an appropriate health assessment. R.R.'s primary evidence that he requires a complete physical examination came through the testimony of Esther Lackey, M.D., who conducted a "very brief" examination of R.R. in preparation for the hearing. The District, on the other hand, argued that R.R.'s identified handicap, SLIC, is not a medical condition. Therefore, according to the District, R.R.'s health does not affect his educational performance as identified by his handicap. The IHO disagrees with both propositions.

The IHO is cognizant of R.R.'s difficulty in proving that he has a medical need for a thorough physical examination without first having a thorough physical examination. It is the proverbial problem of, "Which came first, the chicken or the egg?" Testimony from Ms. Lackey stated that R.R. may or may not have a physical problem and that, in her opinion, testing is therefore advised. She based this belief on a "very brief" examination of R.R., which by her own testimony was less thorough than the tests administered by the school nurse, and a discussion of family history with C.F. Dr. Lackey mentioned R.R.'s past use of Ritalin and the fact that he donates plasma twice a week as red flags for pursuing a medical examination.

The District's argument that students identified as SLIC cannot have their "handicap" affected by medical problems is refuted by the assessments required of it under 1 CCR 301-8, 2220-R-3.03(5). A health history and current health status is recommended for students identified with the SLIC handicap. "Recommended" is defined under the regulation to mean "that the assessment procedure can be expected to provide relevant information in up to 80 percent of the cases..." 2220-R-3.03(5)(b)(ii). "Health history and current health status" is defined as information regarding a child's birth history, health habits, family health, significant illnesses, accidents, injuries or operations, medications used, screening results, height, weight, body build, medical observations, review of systems and source of medical care. 2220-R-3.03(5)(a)(ii).

It is the IHO's finding that the District must provide health assessments. The IHO also finds, however, that the District did provide R.R. with the minimal health-based assessments required of it by law. R.R. was provided with a vision and hearing screening prior to the 20-day diagnostic placement on April 27, 1992. The nurse administered a series of non-invasive tests.

The health history of R.R. was available to the IEP staff and was discussed. Despite Dr. Lackey's testimony that further testing may prove fruitful, it is the IHO's determination that the District provided the minimal assessments required of it under the law and that, while second opinions or more thorough diagnoses are always desirable, there is no legal requirement that additional health evaluations be conducted at District expense.

In the same vein, the IHO also rejects R.R.'s request that additional psychological evaluations are required. Again, R.R.'s primary evidence that an independent evaluation is required came from the testimony of social worker Lee Oesterle. Mr. Oesterle's experience with R.R. was from a few minutes with him in class and a visit lasting approximately one hour with R.R. and C.F. at their home. Mr. Oesterle also reviewed R.R.'s medical and school records. According to Mr. Oesterle, it is not possible from the records to state that R.R.'s prior attention deficit disorder diagnosis has not gone away. He also testified that although R.R. is apparently not showing signs of anxiety in school, this may be because he is not being challenged, rather than a sign that he is not anxious. Mr. Oesterle testified that he is not an expert in psychological testing and is not recommending specific psychological tests for R.R. He stated that, in his opinion, the psychological tests were inadequate and that a psychologist would know what additional tests were necessary. Mr. Oesterle further stated, however, that he was not alleging that R.R. is failing to receive an educational benefit from his present program.

Again, the IHO is compelled to return to the minimal assessment standards required of the District as a matter of law. R.R. was assessed by the Woodcock-Johnson Psycho-Educational Battery, the WAIS-R test and the Bender-Gestalt test. Test results were comparable to R.R.'s test results in previous years. Social worker Julia Demanett had C.F. rate her son on the Burk's Behavior Rating Scale and discussed the results with her upon completion. Ms Demanett later interviewed R.R. and she discussed his emotional/psychological needs. Under the State Plan, a district is required to provide varied tests and evaluations so that no single test or evaluation becomes the sole criteria for the determination of a handicapping condition or placement. A district is not required to provide every test imaginable, or, as Mr. Oesterle testified, an unknown test to be determined by an unidentified psychologist. Again, although additional tests and second opinions are always valuable, if only to confirm a condition, the District has clearly met its burden by a preponderance of the evidence that it provided adequate assessments and that additional psychological tests at District expense are not required.

The last broad issue before the IHO is whether R.R.'s IEP is reasonably calculated to enable R.R. to receive educational benefit. Rowley, supra. Many of the issues overlap those discussed in the assessments area. However, there can be a significant difference between providing adequate assessments and using those assessments to develop specially designed instruction to meet the unique needs of a child.

R.R.'s counsel has stated a number of issues with respect to R.R.'s IEP. Generally, R.R. argues that the IEP is too general, lacks objective measurements and fails to identify specific services. More specifically in this area, R.R. argues that the District failed to specify student/ teacher ratios, failed to specify the means of delivering recreation as a related service, failed to specify physical education as a service characteristic, failed to thoroughly analyze Extended School Year and failed to specify sex education as a related service. R.R. also states that the IEP failed to identify his present functioning level, failed to note conditions to promote growth and learning, failed to identify his learning style, failed to evaluate generalization skills, failed to analyze the appropriateness of the 1.5 hour block system, provided little information on personality/emotional status and provided no information on how the educational plan should be designed to accommodate these psychological findings. It should be noted that while R.R.'s counsel listed what she considers numerous failures in R.R.'s IEP, counsel, in most cases, failed to cite specific statutory or regulatory grounds on which the argument was based. The IHO, however, will address each issue in order.

There apparently is no argument with the two annual goals established for R.R. by the IEP staffing team. Goal one is for R.R. to develop basic skills needed to function adequately in the community. Goal two is for R.R. to explore realistic job possibilities.

R.R. does disagree, however, with the measurability of the short-term objectives created to meet the annual goals. The short-term objectives were written as such:

1. R.R. needs to maintain appropriate social approach behaviors with peers, employers, co-workers. Measured through parent, school reports and employer reports. R.R. will maintain an age appropriate peer relationship for one year.

2. R.R. will demonstrate ability to budget money for lunch, transportation and personal needs. As evidenced by maintaining budget 50% of time.

3. R.R. will get to class, work on time 95% of time.

4. R.R. will demonstrate the ability to have proper hygiene and personal care skills by coming to school and work clean daily.

5. R.R. will take part in at least 2 recreational time activities in one year's time.

6. R.R. will be involved in at least 2 job training sites in one year's time.

7. R.R. will be given the information to access community resource exchange and he will contact them by May of '92.

8. R.R. will obtain all of the proper identification to apply for JTPA summer jobs for youth.

9. R.R. will demonstrate the skills necessary to secure and maintain a job for at least 3 months.

In particular, R.R. argues that these short-term objectives lack measurable specificity. R.R. cites Campbell v. Talladega Bd. of Educ., 518 F. Supp. 47 (1981); Russell v. Jefferson S.D., 609 F. Supp 47 (1981) and Loscari v. Bd. of Educ., 560 A.2d 1180 (S.Ct.N.J. 1989), in support of his assertion that the short-term objectives lacked objective ways to meaningfully measure progress. The District cites J.S.K. by and through J.K. v. Hendry County School Bd., 941 F.2d 1563 (11th Cir. 1991), for the proposition that objectives do not need to be specific.

The IHO agrees with the District that the Russell case stands for the proposition that the district in that particular case failed to address all of the child's needs and not that it addressed them in non-measurable ways. Although the Loscari case involvse a state statute which provides greater protection than Colorado and federal laws, it also stands for the proposition that measurable objectives are required under federal law. The facts in Campbell are not easily applied to the present case, while the specific objectives (or lack of specificity therein) in J.S.K. are not readily apparent from the opinion.

Measurable short-term objectives are required under federal law, the State Plan and Colorado regulations. An IEP shall include "annual measurable goals established to meet the needs of the child..." 1 CCR 301-8, 2220-R-3.06(5)(b). It is the determination of the IHO, however, that the short-term objectives established for R.R. are measurable. The IHO concedes that, in his opinion, objectives 1 and 9 should have been written with greater specificity. (Transition teacher Deborah Kueck testified that objective number one was not measurable.) Taken as a whole, however, the objectives can be measured and evaluated by tests, observations, recorded data, work samples and other approaches. In particular, the IHO found credible the testimony of Palmer High School special education specialists Linda Moffitt and Steve DeFelice. Called as witnesses by the student, both stated that the short-term objectives were measurable. Ms. Moffitt testified that special service educators "would know what we are assessing." Mr. DeFelice, originator of the so-called "Palmer Program" which emphasizes community-based instruction for special education students, stated that the short-term objectives looked "typical" for his students.

R.R. cites the Colorado Department of Education, IEP Manual, 1990 ed., p. 9, for the proposition that an IEP should include "the desired level of achievement and the type of resources needed to address the change...for example, one goal for the...area of personal hygiene might include objectives about tooth brushing, washing, bathing, toileting and hair care." It is the IHO's finding that R.R.'s more general objective of "demonstrat(ing) the ability to have proper hygiene and personal care skills by coming to school and work clean daily" is sufficiently precise, and by definition includes tooth brushing, washing, bathing, toileting and hair care, etc. It is not required for an IEP staff to list specific objectives for each and every sub-topic regarding hygiene, when all sub-topics are a concern of R.R.'s. And although not a specific issue addressed in the hearing, the IHO notes that the District's responsibility with respect to the IEP does not end with establishing measurable goals. These objectives must then actually be measured thoughout the school year. The District is responsible for collecting quantifiable data on R.R.'s personal hygiene and would not satisfy its requirement of measuring short-term objectives with phrases such as "R.R. comes to school relatively clean on most days." The testimony of the IEP staff was that the goals are measurable and it is the District's responsibility to insure that they are, in fact, measured.

R.R. next argues that the District failed in its requirement to set specific student/teacher ratios in his classes. R.R. cites no authority in support of his argument. R.R. disagrees with his present student/teacher ratios of approximately 11:1 in his educational classes in comparison to the approximate 5:1 ratio provided in self-contained classroom settings throughout most of his educational career. R.R. argues that the District bears the burden of demonstrating the reasons behind the change to a more classical classroom setting.

The IHO finds that R.R. failed to provide any evidence that he is unable to benefit educationally in his present classroom setting or at his present student/teacher ratios. R.R. is correct that a school district is required to provide a "continuum of services." However, R.R. must also show a contiuum of need. R.R., who had withdrawn from school over one year earlier, regained his lost math skills in a classroom with a student/teacher ratio approximating 10:1. In fact, R.R. did not provide any evidence or call any witnesses to testify that he is not able to benefit educationally from his present program. While R.R. may believe that he would receive greater benefits in a smaller classroom setting, the law only requires that a student receive educational benefit, not maximum educational benefit. Rowley, supra.

With respect to specific classes, R.R. argues that the District failed to specify recreation and sex education as a related service. R.R. also argues that physical education should have been specified as a service characteristic because it would meet his needs of leisure activity and social skills development, mainstreaming and least restrictive environment.

The IHO makes no determination whether physical education should have been specified as a service characteristic because it is not a proper question in this case. In theory, there are any number of classes that could meet R.R.'s needs. The issue before the examiner is whether R.R.'s present program is reasonably calculated to enable R.R. to receive educational benefit and not whether physical education or some other program would provide greater benefit.

R.R. argues that he has educational needs in sex education and in recreational/leisure activity which are not being met. The first of R.R.'s two annual goals involves "develop(ing) basic skills needed to function adequately in the community." Sex education and leisure activity are two reasonable needs to function within a community. Leisure activity is listed as a short-term objective of R.R., in that he is to "take part in at least two recreational activities in one year's time." Sex education is not listed in R.R.'s IEP.

During the April 27, 1992 Diagnostic Placement meeting, R.R.'s sexual history was discussed. R.R. had been sexually molested by his mother's boyfriend in 1984. R.R. received therapy at that time. During the February 14, 1992 meeting with Jill Thomas and Ms. Ague, R.R. admitted that he was sexually active with a 42-year-old mentally handicapped woman. R.R.'s sexual partner was three months pregnant with another man's child. R.R. said that he was the father, however, not fully understanding the cause/effect relationship regarding intercourse and reproduction. R.R. showed much embarassment discussing his sexual relationship and remains very shy regarding sex and contraception.

During the Diagnostic Placement, Jill Thomas wrote "need to encourage age appropriate sexual practices" under R.R.'s needs. Special Education Director Ronald Hage requested that she remove "sexual practices" from the IEP, however, stating his belief that all high school students need sex education and that R.R.'s needs were not unique. Ms. Thomas then replaced "sexual practices" with "relationships." R.R.'s IEP addendum therefore listed a need to "encourage age appropriate relationships."

R.R. clearly has a specific educational need for sex education which his present program does not provide. Social worker Julie Demanett testified that she is available for R.R. if he has needs in the area. Steve DeFelice testified that kids seeking sex education information is the ultimate goal. Mr. DeFelice also testified that that goal is "idealistic." The IHO agrees that it is idealistic to believe R.R., on his own volition, will seek sex education counselling. Mr. Hage's position that a 19-year-old student diagnosed as SLIC, who has been previously molested by his mother's boyfriend, and has recently become sexually active with a pregnant 42-year-old mentally handicapped woman, has typical sex education needs is clearly unrealistic. R.R.'s number one goal is to function in the community and sex education is critical to that goal.

R.R.'s need for recreational opportunities was listed as a short-term objective at the March 5, 1992 IEP staffing. This is a reasonable objective for R.R. to function in the community since R.R.'s present primary form of recreation is Nintendo. The District argues that by stating that R.R. has a need to "explore and take part in leisure activities" does not mean that recreation is required in order for him to benefit educationally. The District did not explain, however, what the short-term objective was supposed to mean. In any case, the IHO finds that helping R.R. explore filling leisure time is an important facet of helping him function in society. Therefore, we must look to how the District has attempted to meet this requirement.

The District provided R.R. with a free membership to the YMCA. It also informed R.R. that he could participate in swimming at the Wasson High School pool before school. R.R. eagerly accepted both offers. Once. Jill Thomas testified that the school offered to take R.R. to the YMCA but that he "jumped the gun," and went on his own. R.R. also was told that the pool was available and again decided to attend on his own.

The IHO agrees with the testimony of Ms. Thomas that the District has not met R.R.'s leisure objectives by providing a YMCA pass and informing him of the availability of the swimming pool. In fact, no District employee testified that the objective had been met, or, in fact, was in the process of being met. While R.R. may have "jumped the gun" and participated in activities without District supervision, and testimony indicated that independence is encouraged with SLIC students such as R.R., there was no explanation why a student would receive less support *because* he shows enthusiasm. It comes as no surprise that R.R.'s enthusiasm was dashed when he attended the YMCA and did not understand how to use the weight room. (In fact, in the IHO's opinion, it is dangerous for R.R. not to be provided weight training instruction, an admitted interest, in conjuntion with his YMCA membership.) The testimony was consistent that R.R. is in need of constant encouragement or he quickly loses interest.

Although the IEP states that R.R. will take part in at least two recreational activities in a year's time, and only 2.5 months have passed, it is the IHO's opinion that R.R. has been provided no assistance in reaching this goal. R.R.'s needs are more immediate because he is 19 years of age. The IHO therefore finds that the District will designate Special Olympics as one of R.R.'s leisure activities. At a minimum, the District will provide R.R. with assistance with regard to telephone/scheduling and transportation. The IHO wants to make perfectly clear that he disagrees with R.R.'s assertion that the District was obligated to designate Special Olympics as a characteristic of service. As stated earlier, the issue is not whether a particular program would benefit a student but whether a student's program is reasonably calculated to provide educational benefit. The IHO takes notice of R.R.'s past interest in Special Olympics, however, as well as significant testimony regarding the importance of a student's interest in programs, and orders the District to assist R.R. with Special Olympics as compensation for its failure to provide R.R. with appropriate leisure assistance during the spring quarter.

The IHO rejects R.R.'s argument that the District failed to thoroughly analyze an extended school year. There was no testimony by any witness suggesting that R.R. needs an extended school year while there was extensive testimony, including that by R.R.'s own witnesses, that he requires extensive exposure to varied job sites. The District's present program that encourages R.R. to work in a summer J.T.P.A. job is reasonably calculated to provide educational benefit.

R.R.'s final primary argument involves R.R.'s placement in a recycling position within Wasson High School as opposed to potential positions at Goodwill Industries, Pikes Peak Community College, the University of Colorado at Colorado Springs or in any other community-based vocational position. R.R. argues that his primary goal is to develop basic skills needed to function adequately in the community and that learning these skills would best be achieved by hands-on experience in the community. The IHO was particularly impressed with the testimony of Steve DeFelice and the "Palmer Program" he has inspired. Lee Oesterle also testified that he believed R.R. would maximize his educational training in a community-based position.

Without sounding like a broken record, the IHO again must emphasize that the question is not which program would best educate R.R., but whether the program designed for R.R. is reasonably calculated to provide him with educational benefit. The IHO is compelled to find that R.R.'s present program provides educational benefit. R.R.'s needs include maintaining age appropriate peer relationships. C.F. testified that R.R. has had trouble making friends with children his own age. R.R.'s present position within the school provides him with exposure to students his own age. R.R. also can establish peer relationships in class and at lunch. Geri Ikola testified that R.R. appears to be fostering friendships. Although Lee Oesterle testified that the lack of visible signs of anger or anxiety in R.R. at school might be caused from boredom, the bulk of the testimony was that R.R. was adjusting well to his classroom settings.

It appears that R.R. has withdrawn from an earlier argument that a recycling position within the high school is a more restrictive environment than a community-based position, such as his previous job at Goodwill Industries. Steve DeFelice testified that, in his opinion, the least restrictive environment is in a classroom setting that is typical for non-handicapped peers. There was no testimony that a community-based position such as R.R.'s previous job at Goodwill was any less restrictive than his recycling position at Wasson High School. In addition, although R.R. questioned witnesses at length with respect to Goodwill Industries' job programs, there was no evidence that R.R.'s responsibilities at Goodwill, listed as "collating" on his IEP, were of greater benefit or more challenging to R.R. than his responsibilities in his present recycling position at the high school.

The IHO was very impressed by Mr. DeFelice and his Palmer Program. The IHO noted, however, Mr. DeFelice's testimony that he had no "concrete written data" that his students were learning better now than they were before his program was initiated 1.5 years ago. R.R.'s argument that he should be placed in a program such as the one offered at Palmer High School was significantly based on the alleged lack of concrete data with respect to R.R.'s present classroom agenda. The IHO has no reservations regarding Mr. DeFelice's observations of success, however, and commends him on his effort.

The IHO, however, must again return to the issue of whether R.R.'s present program is reasonably calculated to provide educational benefit. The evidence shows that not only is it calculated to provide benefit, it is actually providing benefit. It is emphasized, however, that the IHO's determination with respect to R.R.'s classroom schedule is only for the spring quarter of 1992. For example, R.R. has regained lost mathematics skills. The next logical step is to carry those skills into the community. R.R. is taught living skills within the classroom, primarily during his first block, although all of his teachers testified that he receives assorted training within their classes. The logical step is to take that training and apply it within the community. Ms. Ikola testified that the plan for R.R. this fall is to place him in the community a significant portion of the school day. R.R.'s fall schedule, however, is not at issue. It is the IHO's determination that R.R.'s spring quarter schedule was reasonably calculated to provide him with an educational benefit.

IV.

CONCLUSION

Based upon the above findings and conclusions, it is the decision of the Impartial Hearing Officer that:

1. The District provided R.R. with appropriate assessments as required by law and that R.R. is not entitled to additional independent assessments at District expense;

2. The goals identified in R.R.'s Individual Educational Plan are measurable by law;

3. The District failed to provide for R.R.'s identified need to participate in recreational activities. The staffing team will reconvene no later than the beginning of the fall semester to determine the specific program to fulfill the commitment. The program will include providing assistance to R.R. with scheduling and transportation to Special Olympics events as needed and to encourage Wasson High School's staff to support R.R. in this activity.

4. The District failed to provide for R.R.'s identified need to receive sex education. The staffing team will reconvene no later than the beginning of the fall semester to determine the

specific program to fulfill the commitment. The program will include classroom instruction in similar scope as that testified to by Steve DeFelice during the hearing.

Dated in Aurora, Colorado this ~~5th~~ 3rd day of June, 1992.

Respectfully Submitted,

Andrew J. Ma

Andrew J. Maikovich
Impartial Hearing Officer
2135 S. Rifle Way R-301
Aurora, Colorado 80013
(303) 368-8196

Case Number: L92:115

Status:	Impartial Hearing Officer Decision
Key Topics:	Free Appropriate Public Education (FAPE) Least Restrictive Environment (LRE) Extended School Year (ESY) Transition Services Procedural Safeguards

Issues:

- Whether the District violated the right to FAPE by placing the student in a school other than the school he would attend if he were not disabled.
- Whether the District is required to provide services in excess of the traditional academic school year.
- Whether the District failed to assess, make IEP provision for, and provide, transition services.

Decision:

- An IEP team, including the parents shall meet to make provision for ESY and transition services.
- At each annual IEP meeting, the student's home school shall be considered in determining LRE.

Discussion:

- Special education programs at neighborhood school and cluster programs at other district schools.
- Parents' needs to meet only in the evenings and on weekends must be accommodated.
- Predetermination of placement was inappropriate.

DEPARTMENT OF EDUCATION, SPECIAL EDUCATION
STATE OF COLORADO

Case No. L92:115

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

The hearing in this matter was held September 23-25, 1992, at Manning Adult Education Center in Wheat Ridge, Colorado. Jurisdiction is conferred by P.L. 94-142 (20 U.S.C. Sec. 1415); 34 C.F.R. Sec. 300 et seq.; and part VII of the current Colorado State Plan (FY 1992-94). Petitioner (the Child, or "G.," henceforth) was represented by William A. Baesman, of Gorsuch, Kirgis, Campbell, Walker & Grover, and Respondent (Jefferson County School District) was represented by Alan J. Canner, of Caplan and Earnest, P.C. The hearing was open to the public; the Child did not attend.

The hearing was convened pursuant to a complaint filed by the Child's parents on July 23, 1992, amendment to which was permitted by the impartial hearing officer ("IHO") after Petitioner obtained counsel. As amended, the complaint stated three issues:

(1) that the Respondent violated Petitioner's right to a free appropriate public education, pursuant to 20 U.S.C. Sec. 1400 et seq., by failing to provide him with special education services in the least restrictive environment by placement in a school other than a school Petitioner would attend if he were not disabled, contrary to 34 C.F.R. Sec. 300.552;

(2) that the Respondent violated Petitioner's right to a free appropriate public education pursuant to 20 U.S.C. Sec. 1400 et seq. in that Respondent has failed to provide Petitioner with special eduation within the meaning of 34 C.F.R. Sec. 300.14 and .346 and also within the meaning of 20 U.S.C. Sec. 1401(a)(19) and (20) by:

(a) failure of Respondent to assess Petitioner's need for an individualized educational program ("IEP") for a duration in excess of the traditional academic school year; and

(b) failure of Respondent to assess, make IEP provision for, and provide, transition services.

Although Petitioner's original complaint additionally sought a remedy under Sec. 504 of the Rehabilitation Act, Petitioner stated for the record, during the hearing, that he did not seek relief under that Act.

II. PRELIMINARY MATTERS

Prior to the hearing, the parties arrived at a settlement of the extended school year ("ESY") issue (par. (2)(a), above), which agreement is composed of two letters, an offer by Respondent and acceptance by Petitioner. The parties' stipulation is as follows:

> The District acknowledges its failure to properly assess whether G. was eligible for ESY services. The District's special education staffing team will reconvene, subsequent to a decision rendered by the impartial hearing officer in the due process hearing, expressly for the purpose of fully reviewing G.'s eligibility for ESY services. In considering G.'s eligibility, the team, with the participation of the parents, will consider those factors identified by the 10th Circuit Court of Appeals in the Johnson case that are relevant, as well as any other factors which may contribute to a meaningful determination.
>
> Should the staffing team determine that G. is eligible for ESY services, that determination will be applied retroactively as if that decision had been made prior to conclusion of the 1991-92 school year. Accordingly, based on such determination, because ESY services were not offered to G. during the summer of 1992, the School District will construct an appropriate program to compensate for G.'s not having received those services last summer. A compensatory program would be directly related to special skills reflected in G's goals and objectives that had been identified as having been placed in jeopardy. The compensatory model might involve an increased intensity of service delivery during the regular school hours or days, or may take the form of hours or days in excess of the regular school hours and calendar.

Other matters resolved either prior to or at the outset of the hearing are the following:

1. Upon written request of the Respondent, the 45-day timeline within which this decision would otherwise have been required to be rendered and mailed to the parties was extended. Authority for such extension, on the request of either party, is found in the Colorado State Plan, FY 1992-94, Part II, Sec. (B), Subsec. (VII)(B)(4)(b)(1), at p. 31.

2. At the prehearing conference held in this matter on August 28, 1992, the parties disputed who bore the burden of

proof, and were ordered to submit briefs on this issue. By letter to the hearing officer dated August 31, 1992, however, Petitioner, based on the decision of the Tenth Circuit Court of Appeals in Johnson v. Indep. School Dist. No. 4 of Bixby, Oklahoma, 921 F.2d 1022 (10th Cir. 1990), conceded that, as the party attacking the student's placement, he bore the burden of proof. The Hearing Officer consequently has made no independent examination of this issue.

3. A document production dispute was resolved to the satisfaction of Petitioner upon Respondent's assurance, on the record, that all known relevant documents had been provided.

4. Certain facts were stipulated to at the prehearing conference on August 28, 1992, which, where material, are incorporated in the present findings.

5. The witnesses who testified in this matter for Petitioner were as follows: Lisa Howes, the Child's teacher at Golden High School; Lewis Byers Jackson, who was qualified, by stipulation, as an expert in the areas of special education curriculum and integration and transition processes, for students with severe or severe and profound disabilities; Anne Mitchell, West Area Manager for Special Education and Related Services, Jefferson County School District; Terry Lynn Deniston, who was qualified, by stipulation, as an expert in the areas of special education curriculum, including integration and transition processes, for students with multiple handicaps; and the Child's mother.

Respondent's witnesses were Judith French, occupational therapist; Lavona Jean Allen, the scheduler at the Evergreen Bus Terminal; John Vidal, the principal at Evergreen High School; Anne Mitchell, again, who testified as a lay witness; Lisa Howes, again; and Robert Fanning, District Manager for Exceptional Student Services in the Jefferson County School District, who, by stipulation, was qualified as an expert in the areas of whether the Child's IEP can be designed, implemented and administered at Evergreen High School; teacher qualifications necessary both to design and implement an IEP such as that designed for the Child; the various teachers and service specialists providing or who might provide services to the Child and their qualifications to do so; and assessment, design, and implementation with respect to the Child's needed transition services and IEP. Again pursuant to stipulation of the parties, Dr. Fanning was not qualified to give expert testimony regarding any financial aspects of school programs.

Exhibits admitted into evidence were:

For Petitioner: Exhibits 1-58, 72, 73
For Respondent: Exhibits E-H, L-P

One exhibit, the resume of Anne Mitchell (Respondent's Exhibit Q), was offered after Ms. Mitchell had testified and departed, so was not admitted, for lack of foundation. Also, although many references were made by Petitioner during the taking of testimony and closing argument to the Jefferson County Comprehensive Plan, this plan was not offered as an exhibit, nor is it available in the law library. To the extent this Plan was read into evidence and discussed, therefore, it has been considered here; to the extent it was read aloud from during closing argument, it has not.

A list of objections, and the rulings thereon, has not been prepared to accompany this decision, because the hearing was tape-recorded and a complete set of duplicate tapes provided to each party at the conclusion of the hearing. At the request of either party, however, on ten days' notice the IHO will compile and certify such a list.

III. FINDINGS OF FACT

1. Petitioner is 17 years old, nearly 18, and living with his parents and younger brother in Evergreen, Colorado, within Respondent's school district. His condition is "multiply handicapped," which means he has two or more disabling conditions which inhibit his education, one of which is cognitive impairment (mental retardation). In this case, in addition to the mental disability, the Child has speech and some degree of motor skills disabilities.

2. G. functions overall at a 2- to 3-year-old level. He is unable to recognize numbers, differentiate coins, tell time, or recognize letters of the alphabet, although he can recognize his written name and certain other "sight words." He is unable to write or trace, and his speech is limited and difficult to understand. He is small in stature, due to an underactive thyroid; he has scoliosis and cataracts (which do not appear to impede his ability to learn); and his left leg is shorter than his right. Unless directed, G. does not go to the toilet, and so must wear a diaper. His strengths at school are a gentle and compliant personality, and willingness to try new tasks. G. is ambulatory and can climb stairs.

3. G. moved with his family to Evergreen in November 1991, from Georgia. Based on discussions school administrative officials had with the Child's parents, as well as his prior school records, the District made a "direct placement" of G. in a program known as the "Challenge Program" at Golden High School, in Golden, Colorado. He began there December 2, 1991, and was continuing there at the time of the hearing. Golden High is an integrated school, but not the school G. would attend if he were not disabled. The Child's neighborhood school is Evergreen High

School, and the parents desire him to be placed at Evergreen.

The Challenge Program.

4. The Challenge Program is in its fourth year, and, although there was testimony that, when it began, it served eight or nine students, it served 12 students last year and this year serves 11. These students currently are between the ages of 14 and 20 and have a range of disabilities, from some who are non-verbal and need restroom help to some who can read, write, and attend classes on their own. There is one deaf student. None of the students use a wheelchair this year, although some have in the past. The students come from different areas in Jefferson County; three were bused from Evergreen last year.

5. The Challenge program is housed in a large converted electronics laboratory, with lab and classroom portions and a bathroom nearby, in Golden High School. Golden High is wheelchair accessible. All students take part in jobsite training or "job shadowing," whereby they walk three to four blocks to nearby businesses in Golden and perform jobs there during one of two 1-3/4-hour sessions per day. G.'s jobsite last year was mostly Pizza Hut, where he vacuumed and swept the floor. G. also has delivered newspapers for the Golden Transcript. He is accompanied by either the teacher or one of three paraprofessionals when he goes to the jobsite.

6. Besides the "job shadowing," G.'s school schedule includes "PEP," or "P.E. Plus," adaptive physical education where regular students are paired with special education students; lunch, where the Challenge students sit at a separate table with the two paraprofessionals who accompany them; and "Independent Living Skills," which is taught in the Challenge classroom. Every Friday is "community day," when the Challenge students participate in a variety of recreational activities. They go bowling, to the mall, to the State Capitol in Denver, to museums, and the like.

7. G.'s teacher, Lisa Howes, began teaching the Challenge Program class last year on a "TTE," or "temporary teacher endorsement," while working toward her "Teacher II" certificate, which will qualify her to teach special education. Ideally, she should have a "Teacher III" endorsement. She is assisted in the Challenge classes and activities by three paraprofessionals; last year, there were four. G. also receives related services from two itinerant specialists, a speech/language and a motor skills professional, each of whom last year spent 1/2 day per week at Golden High, on different days. An itinerant psychologist also visits on the same basis, but there is no evidence G. receives services from the psychologist.

8. G.'s IEP indicates he spends 33% of his time in

"regular education," but further states such "regular education" is provided by the Challenge teacher. Although Lisa Howes testified that either she or a paraprofessional accompanies some students "to class," there is no evidence that G. in fact is integrated into any regular classes.

9. G.'s bus trip to Golden takes one hour in the morning, because of a detour to another student's school, and one-half hour in the afternoon. His opportunities to participate in regular school activities are limited because he does not live in the neighborhood, and he does not have social contact with any of his peers from Golden outside of school. G.'s family does not go to Golden.

Special Education Alternatives in Evergreen.

10. Evergreen High School last year offered a program consisting of three different levels of service. The levels are for "SLIC" (Significant Limited Intellectual Capacity), "SIED" (Significant Identifiable Emotional Disorder), and "P/C" (Perceptual/Communicative disability, or learning disabled) students. Each student's program is individualized, consisting of the mix of aids and services deemed to be of benefit, such as work with itinerant specialists and in resource rooms, as well as integration into regular classes. Self-contained classes are constituted "if that's a need." No evidence was presented as to the number of students presently receiving instruction in self-contained classes.

11. The students with limited intellectual capacity who are eligible for special education services at Evergreen High School are characterized as at least "educably mentally handicapped." G. is characterized by the District as falling below that level, however, or as only "trainably mentally handicapped." There is no "Challenge Program" at Evergreen, and "PEP" is not offered, although work experiences in the community are identified for students.

12. The special education program at Evergreen is staffed by at least four full-time teachers and three 17-hour/week aides. There is also a full-time "affective" person who works with students' social and emotional problems, and a psychologist who visits 1/2 day per week for purposes of assessment. Speech/language and motor specialists are not assigned to Evergreen on a regular basis, but would be provided if a student's IEP so specified.

13. None of Evergreen's special education staff has the background to deal with severely handicapped students. The SLIC teacher's position was open during the summer, but the District did not seek anyone qualified to teach severely or profoundly handicapped students. The position was filled by Peggy Hansen,

who has a "TTE," enabling her to teach special education while working toward her "Teacher II" endorsement.

14. The regular faculty members at Evergreen are regarded by administration personnel as resistant to the concept of mainstreaming severely disabled children into regular classrooms, because the resources are not there which allow them to reach typical students. Evergreen High School is not handicapped accessible, it is overcrowded, and three temporary buildings are being used for regular classes. The cost of implementing a "Challenge-type Program" at Evergreen would be approximately $110,000.00. If the bond issue passes at the election in November, Evergreen High School will be the subject of significant renovation and construction, however.

15. No evidence was offered as to the programs, levels of service offered, or physical characteristics of Evergreen Junior High School.

IEP Development and Placement History.

16. Upon G.'s entry into the Jefferson County School District, no new assessments or evaluations were done. Initial placement of G. was made at a meeting of school officials with his parents on December 2, 1991. School officials had told the parents there was currently "no program" in Evergreen, but that there were now four students from Evergreen who might constitute a class next year. The parents, understanding that the Golden placement was temporary, to the end of the school year, consequently signed forms entitled "Referral for Special Needs Student" and "Permission for Placement in Special Education Programs or Services," both of which indicated placement in Golden High School.

17. The parents also signed forms consenting to a proposed special education assessment to be done of G., and to the release to Respondent of G.'s confidential school records. Both parents had recently begun new jobs with the same employer in Jefferson County, and told G.'s teacher and the other school officials present that they would be unable to miss work to attend the Child's formal IEP staffing when that took place. They therefore indicated they desired merely to "look it over" after the IEP was prepared.

18. On February 10, 1992, Lisa Howes, G.'s teacher, sent a note home in G.'s bookbag to his parents, indicating that the IEP staffing for G. would take place at 8 a.m. on February 14, 1992. Although Lisa Howes knew the parents' difficulty with missing work, there is no evidence that she telephoned them or otherwise attempted to schedule a mutually satisfactory time so that the parents could participate in this conference.

19. Present at the IEP staffing on February 14, 1992, were Lisa Howes, the Child's teacher; Judy French, an occupational therapist; and Kathy Wazalis-Webber, a speech/language professional. The IEP which resulted consists of two documents, one a form entitled "Individual Educational Program--Staffing," and another a form entitled "Individual Educational Program--Goals and Objectives." Petitioner's Exhibits 51 and 52.

20. This IEP was described by several witnesses as "functional," intended to provide G. with a variety of generalized basic skills necessary to function at home and in the community. It reveals that two of seven listed types of placement alternatives were considered for G., a "self-contained special class" or "special day school/program." The IEP recommended placement of the Child in the Challenge Program at Golden as the least restrictive environment in which his educational services could be delivered.

21. The two forms which constitute Petitioner's IEP taken together contain information substantially complying with four of the requirements of an IEP:

a. The present levels of educational performance of the Child are provided by virtue of the "assessment summary" in the "Staffing" document, which indicates educational/developmental; psychological; social; communicative; and physical areas of performance were assessed. This part of the form was substantially completed by the IEP team. The "Goals and Objectives" document also contains an area for "baseline" data, which was blank in some instances, making progress towards those short-term instructional objectives incapable of objective determination.

b. A statement of annual goals, including short-term instructional objectives, is found in both documents under the headings "Annual Measurable Goals" and "Goals and Objectives," in the areas of vocational, integrational, recreation/leisure, community awareness, and daily living skills.

c. A statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, is provided in "Characteristics of Service" and the "Placement Plan" in the Staffing document, as well as the "Methods and Strategies" column of the Goals and Objectives document.

d. The projected dates for initiation and anticipated duration of such services are provided in the "Placement Plan" in the Staffing document.

Provision of Transition Services.

22. The two forms which constitute G.'s IEP do not by their terms call for a statement which describes transition services to be provided. These forms indicate they were last revised in 1988, which would have been prior to amendment of 20 U.S.C. Sec. 1401(a)(19) and (20)(D) (1991 Supp.), defining "transition services" and expressly requiring a statement of transition services be provided in an IEP. See "Conclusions of Law," below.

23. G. was of the age to receive transition services in February 1992. Although both Lisa Howes and Judy French testified that they knew this fact, that they knew of the change in the law, and that they considered transition in developing G.'s IEP, the forms as completed by them do not contain the terms "transition" or "transition services" anywhere. Both educators testified that they regarded G.'s IEP as addressing transition, nevertheless, as it generally "prepared him for life."

24. Because of its functional nature, G.'s IEP does use language which appears to address transitional needs, establishing such goals as increasing community awareness, developing daily living skills, learning how to pay for purchases, and so forth. The IEP does not identify any specific environment to which G. will move after graduation, however, nor is any specific "outcome" designated for him at age 21. His interests and needs with respect to such an outcome are not indicated, nor has any coordinated set of activities for him to meet his specific outcome been designed. I thus find that no statement of transition services is provided in this IEP.

25. In addition, G. has very limited ability to generalize, meaning he cannot readily transfer skills from the environment in which he learned them to another. For example, although he might learn to cross a street by himself at an intersection in Golden, he probably would not be able to cross a street by himself at an intersection in Evergreen where he had not had such training. Also, although the Challenge Program provides G. jobsite training vacuuming the floor at Pizza Hut in Golden, he probably would not be able to transfer that skill even to another Pizza Hut, let alone another type of business.

26. Any statement of transition services which is developed for G. must, to confer some educational benefit, be predicated upon his limited ability to generalize. A coordinated set of activities must be planned to include, to the extent possible, community experiences and the development of employment and other adult living objectives in G.'s specific post-school environment, therefore, not just in the community in general. As identified in 1992-93, that post-school environment is Evergreen, not Golden.

Placement in the Least Restrictive Environment.

27. The above finding that the IEP lacks a statement of transition services means it is not complete. Since the Child's placement, in the sense of whether an appropriate education is being provided in the "least restrictive environment" ("LRE"), can only be determined with reference to his full IEP, no ultimate conclusion can be drawn here with respect to whether that LRE exists in Evergreen or in Golden. However, certain factual findings can be made at this point which, when weighed in the balance with the findings respecting transition services, should guide the course of future IEP development and decisions regarding placement.

28. Aside from the lack of transition and ESY services, and without reference to the LRE question (because of procedural defects, see "Conclusions of Law," below), I find that G. is receiving an appropriate education in the Challenge Program. The program's focus on assisting G. to generalize skills, by providing a variety of community experiences, provides more than de minimis benefit to him.

29. No consideration has ever been given by the IEP team or school officials to the question of whether G. could receive an appropriate education in Evergreen, either at Evergreen High School or Evergreen Junior High School. The LRE can only be determined as between "appropriate" alternatives.

30. The fact that Evergreen High School is not handicapped-accessible is not material when deciding upon the least restrictive environment for G.

31. Since the certification last year of Lisa Howes, the teacher in charge of the Challenge Program, is the same certification presently held by Peggy Hansen, and Evergreen High is similar to the Challenge program in terms of aides and itinerant specialists available, I find that Evergreen High School possesses staff who are qualified to deliver educational services, including transition services, to G. The development of suitable work experiences in the community for special education students also is among Peggy Hansen's present duties.

32. The fact that other students are bused long distances from the mountains to Evergreen High School has no bearing on deciding G.'s placement.

IV. CONCLUSIONS OF LAW AND DISCUSSION

33. The preceding introduction, preliminary matters, and findings of fact are incorporated herein as if fully set forth.

Procedural Matters.

34. Because the decision arrived at today requires a reconvening of the IEP team to remedy a substantive defect in Petitioner's IEP (failure to provide a statement of transition services), procedural defects in that IEP's development are moot. Also, procedural defects were not specifically complained of by Petitioner. However, since the failure to follow prescribed procedures in development of the IEP in and of itself constitutes denial of a free appropriate public education, Hall v. Vance City Bd. of Ed., 774 F.2d 629, 635 (4th Cir. 1985), such failure would be sufficient grounds for "remanding" to the IEP team even without the substantive defect. To deter repetition of such procedural errors in the development of the next IEP, they will be noted here at the outset.

a. There is a strong Congressional preference for full participation of the parents in the development of their Child's IEP. The State Plan, at Part II, Sec. V(E)(2)(g) (p. 16), states that if the parents are unable to attend the staffing/IEP conference, the district must use other methods such as conference telephone calls to ensure their participation, and maintain documentation of its attempts to arrange the staffing at a mutually convenient time. The federal regulations, at 34 C.F.R. Sec. 300.345 (4-1-91), also state that the public agency shall:

> take steps to insure that one or both of the parents of the handicapped child are present at each meeting or offered the opportunity to participate, including ... [s]cheduling the meeting at a mutually agreed on time and place... If neither parent can attend, the public agency shall use other methods to insure parent participation... A meeting may be conducted without a parent in attendance [only] if the public agency is unable to convince the parents that they should attend. In this case, the public agency must have a [detailed] record of its attempts to arrange a mutually agreed on time and place...

Even though Petitioner's parents consented to review the IEP at home, after it had been prepared, because Respondent did not make the required attempts to inform them of or accommodate their right to participate in IEP development at a mutually satisfactory time and place, such consent was not informed. See 34 C.F.R. Sec. 300.500(a) (4-1-91). If the parents can attend the IEP conference only on weekends or evenings, I conclude that such needs are reasonable and must be accommodated by the District.

b. The IEP reveals that only two placement options were entertained for G, rather than the whole range of possibilities contained on the form. In addition, school administration officials never discussed with the parents specific aspects of services that were available in Evergreen, nor is there any indication they considered whether G.'s needs could be met with the use of supplemental aids and services there, or considered the parents' desires. The IHO does not know what could be done at Evergreen, because Respondent never seriously considered that an option. The testimony and forms thus compel the conclusion that placement in the Challenge Program was predetermined, in violation of 34 C.F.R. Sec. 300.550(b)(2) and -.552 (4-1-91); 20 U.S.C. Sec. 1412(5)(B) and 1414(a)(1)(C)(4) (1983); and the State Plan, at Part II, Sec. V(E)(2)(13) (p. 16).

> It is not sufficient that school officials determine what they believe to be the appropriate placement for a handicapped child and then attempt to justify this placement only after the proposed IEP is challenged by the child's parents.

Greer v. City of Rome, 950 F.2d 688 (11th Cir. 1991), opinion withdrawn for jurisdictional defects, 956 F.2d 1025 (1992). On the same facts, I also conclude that the Child's placement was made as the result of a category of handicapping condition or configuration of the service delivery system, in violation of the Colorado State Plan at Part II, Sec. X(A)(2) (p. 59).

c. The failure to provide baseline information in G.'s IEP (see par. 21, above) is another procedural defect which must be corrected before the IEP may be considered legally sufficient. 34 C.F.R. Sec. 300.346(e) (4-1-91).

Statement of Transition Services.

35. The Education of the Handicapped Act amendments enacted in 1990, P.L. 101-476, 104 Stat. 1103, require a statement of transition services in an IEP, for students aged 16 and over. 20 U.S.C. Sec. 1401(a)(20)(D). The House Committee Report on the bill which became P.L. 101-476 made clear that "a statement" is required as a component of an IEP. House Rep. No. 101-544, 5 U.S.Code Cong. & Ad. News 1731 (101st Cong., 2d Sess. 1990). The Colorado State Plan tracks the requirement, stating that the IEP staffing team shall "[i]dentify the specific ... transitional ... services to be provided to the child ..." Part II, Sec. V(E)(2)(f)(10) (p. 16) (emphasis added).

36. Neither the federal nor the state regulations have yet incorporated the "statement of transition services" requirement into their descriptions of the requisite components of an IEP, but the requirement must be adhered to nonetheless. "A rule or regulation which ... oversteps the boundaries of interpretation of a statute by ... restricting the statute contrary to its meaning cannot be sustained." Helvering v.

Sabine Transp. Co., 318 U.S. 306, 87 L.Ed. 773, 63 S.Ct. 569 (1943).

37. I conclude based on the foregoing that not only as a matter of fact, but as a matter of law, G.'s IEP contains no statement of transition services.

A case which has been instructive in deciding the present situation is Todd D. by Robert D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991), where the transition provisions of the IEP for a child with a severe emotional disturbance were the subject of the litigation. A separate statement of transition services was provided in the IEP, identifying Todd D.'s home community in Georgia as his post-school environment, and identifying specific community-based activities for him there following his graduation from a residential placement in San Marcos, Texas. The transition goals included visits to his family in Georgia in preparing for return to his home community, among other things.

A facility in Todd's home community, or even in the state of Georgia, to which he might presently transfer and at which he might obtain aid in meeting these goals could not be identified, however, so his IEP team reconvened and determined that Todd's IEP could simply not be implemented. The district court agreed, and decided that, because Todd could receive sufficient educational benefits in a facility outside his home community, his placement in Texas did not deprive him of a right to an appropriate education. The court consequently ordered Todd's IEP to be changed.

The federal court of appeals recognized that Todd could not achieve his goal of transition into the DeKalb County community as long as he remained at such a long distance from home, but that he could, however, make some progress toward transition in general there. The conflict was thus similar to G.'s, in that G.'s generalized progress in Golden appears inconsistent with his specific need to make transition to the community of Evergreen. The court in Todd D. ultimately held, based on expert testimony, that Todd must be placed at a facility located close enough to his home community to allow him to visit the places to which he was to make transition, thus permitting full implementation of his IEP.

In light of the expert testimony concerning G.'s inability to generalize, visits to his post-school environment, at the least, will be necessary to effect G.'s successful transition.

Least Restrictive Environment.

38. Respondent has provided much authority for the proposition that a school district may "cluster" services to

individuals with similar needs. That authority is persuasive, and I note that I cannot impose my view of preferable educational methods or policy on the District, nor make any decisions expressly allocating District resources. See, e.g., Board of Ed. v. Rowley, 102 S.Ct. 3034 (1982).

However, none of Respondent's cases deal with the problem presented here, which is how meaningful transition services can be provided from a remote placement. The specific focus of transition services which is required in G.'s case skews the balance which (ignoring procedural defects) would otherwise be in favor of leaving G. in the Challenge Program, as providing an appropriate education for him in the least restrictive environment. Experiences such as Challenge provides, preparing G. for life in the community in general, are sufficient for non-transitional functional education to occur. When transition is factored into G.'s educational calculus, however, only experiences in the specific post-school community will do. While to a person with a high degree of generalizing capability "the community" is the world, to this person, who cannot generalize at all, the community is only as big as the areas in and around Evergreen he will need or want to use following graduation.

Whether the new IEP will require placement of G. in the Challenge Program still, even in light of the requirement of transition services focused on Evergreen, is a decision which cannot yet be made. Although G.'s educational needs as identified in his current IEP may be significantly different from those of other students presently served at Evergreen High School, incorporation of the transition component will very likely make his educational program significantly different from that of the other students at the Challenge program, as well. Although I decline to change the placement from Golden to Evergreen in a vacuum, then, without knowing what type of transition services can be offered from the Golden base, or what type of educational services could be offered G. in Evergreen, I note that the nearer G. approaches to graduation, the more important the provision of specifically focused transition services to him must become, and the less likely that his educational needs as a whole can be adequately met by attending school in Golden.

V. DECISION

39. The foregoing findings and conclusions are hereby incorporated by reference.

40. Respondent has failed to provide a free appropriate public education for Petitioner, within the meaning of 20 U.S.C. Sec. 1400 et seq., by failing to provide an individualized educational program which makes provision for transition services.

41. Petitioner's IEP team, including the parents, shall reconvene within ten days of receipt of this order, at a mutually convenient time and place, and, consistent with the findings and conclusions contained in this decision, shall prepare a new IEP providing for ESY and transition services. At each annual reconvening of the IEP team, the Child's post-school activities and environment must be specifically identified anew in determining transition services to be provided to Petitioner. As identified for the 1992-93 school year, Petitioner's post-school environment is Evergreen.

42. Determination of the least restrictive environment, as among alternative settings appropriate for implementation of G.'s IEP, shall be made by the IEP team, in compliance with the statutes, regulations, and State Plan. The procedural defects which mar the present IEP (see "Conclusions of Law," above) shall be remedied. Placement of Petitioner in the Challenge Program shall be made only after consideration of the spectrum of all appropriate alternatives available in Evergreen, and only if required by his IEP.

43. Should any stay of the present decision be requested pending appeal, Petitioner shall remain in his current educational placement at the Challenge Program in Golden High School.

VI. APPEAL RIGHTS

These findings of fact, conclusions of law, and decision will go the parents, the superintendent of the Jefferson County School District R-1, and the Colorado Department of Education.

If dissatisfied with these findings, conclusions, or decision, either party may request a state level review by filing or mailing a notice of appeal and designation of the transcript with or to the State Division of Administrative Hearings within 30 days after receipt of the IHO's decision. At the same time, the appealing party shall mail copies of these documents to the Colorado Department of Education and to the other party in the proceeding before the IHO at his or its last known address. Within five days of receipt of a notice of appeal, any other party may file a cross-appeal.

The required contents of the notice of appeal, notice of cross-appeal, and designation of transcript are stated in the Impartial Due Process Hearing section of the Colorado State Plan, FY 1992-94. An administrative law judge will be appointed to hear the appeal. Any party wishing to appeal this order has the same rights as he or it had for this hearing. Either party may appeal to the court of appropriate jurisdiction if dissatisfied with the final order.

Case Number: S92:115

Status: State Level Review

Key Topics:
Transition Services
Free Appropriate Public Education (FAPE)
Procedural Safeguards (scope of review, meetings)

Issues:

- Whether, as a matter of law, the student must be educated at the neighborhood school.
- Whether transition services can be provided in a school other than the neighborhood school as a matter of law.
- Whether the district denied the student FAPE because it failed to provide transition services.

Decision:

- The legal preference for placement at a neighborhood school is not a mandate.
- The District failed to provide a FAPE by failing to provide an IEP which makes provision for transition services.
- The IEP contains no statement of transition services so the IEP team must convene to complete the IEP and then determine the placement for the student.
- The IEP meeting must be scheduled at a time when the parents can attend only under the specific facts of this case.
- The decision is remanded to the District to conduct a new staffing and develop an IEP consistent with this decision.

Discussion:

- Legal requirements regarding placement do not mandate placement in the neighborhood school.
- Clustering of services at a particular location within a district is permissible.
- Transition services must take into account a student's particular circumstances.
- Importance of participation of parents in development of IEP.

DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 92-04

DECISION UPON STATE LEVEL REVIEW

[redacted]

Appellee/Cross-Appellant,

v.

JEFFERSON COUNTY SCHOOL DISTRICT R-1,

Appellant/Cross-Appellee.

This matter is the state level review of a decision of an impartial hearing officer pursuant to the Individuals With Disabilities Education Act, 20 U.S.C. Sections 1400 et seq. ("the Act") and Part II, Section B, VII of the Fiscal Years 1992-94 State Plan of the Colorado Department of Education ("the State Plan").

A hearing was held before an impartial hearing officer ("IHO"), as provided by the Act and the State Plan, on September 23-25, 1992. The IHO issued her decision on October 7, 1992. An appeal was subsequently filed by Jefferson County School District R-1 ("the District") and a cross-appeal was filed by the student, [redacted] through his parents, [redacted] (these individuals will be referred to as "[redacted]" or "the parents").

Upon the request of [redacted] and his parents, an additional evidentiary hearing was held in this state level review on December 4, 1992. Opening briefs of the parties were filed on December 21, 1992, and response briefs were submitted on January 4, 1993, at which time this matter became ready for a decision.

[redacted] and his parents are represented by William R. Baesman, Esq., and Nina H. Kazazian, Esq. The District is represented by its attorney, Alan J. Canner.

SCOPE OF REVIEW

The IHO made extensive findings of fact in her October 7, 1992 decision. With few exceptions, these facts have not been challenged by the parties. However, certain factual findings are challenged as being unsupported by the record. In addition, additional evidence was taken by the Administrative Law Judge. Accordingly, a determination is required of the nature of this review, the extent to which the IHO's findings of fact are entitled to deference and the impact of the additional evidence taken by the Administrative Law Judge.

An officer making a state level review is required to make an independent decision. 20 U.S.C. Section 1415(c). When a United States District Court reviews a decision made pursuant to the Act by a state administrative agency, the court may take additional evidence and is also required to make an independent decision, based upon a preponderance of the evidence while giving due weight to state administrative proceedings. 20 U.S.C. Section 1415(e)(2); Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley, 458 U.S. 176, 206 (1982) (hereafter "Rowley"); Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991); Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir. 1991), cert. den., 112 S. Ct. 175 (1991); Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988). In light of these statutory provisions, and the ability of state level review officers and district courts to take additional evidence, it is concluded that the standard of review of an IHO's decision varies from that normally found in an appellate review.

The Administrative Law Judge is aware of no cases which describe the scope of review of the factual findings of an impartial hearing officer. It seems appropriate, however, to analogize from the similar role played by federal district courts in reviewing state level determinations under the Act. A district court has the discretion to give appropriate weight to the findings of a state administrative agency. Town of Burlington v. Department of Education for the Commonwealth of Massachusetts, 736 F.2d 773, 791-92 (1st Cir. 1984), aff'd sub nom. School Committee of the Town of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985); see Age v. Bullitt County Public Schools, 673 F.2d 141 (6th Cir. 1982). Under this scope of review, it is sensible to give deference to the factual findings of the IHO, in order not to frustrate the emphasis which the Act places on that hearing procedure. Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988). However, the ability to take new evidence, and the requirement that the state level review officer make an independent decision, suggests that less deference will be given to the findings of the IHO than would be conventional in review of agency fact-finding. Id. The officer conducting the state level review may therefore reject the factual findings of the IHO, if that officer explains the basis for so doing. See Doyle v. Arlington County School Board, supra; Kerkam v. McKenzie, supra.

Accordingly, the Administrative Law Judge will substantially adopt the factual findings of the IHO in this case. With regard to the new evidence taken at the hearing on December 4, 1992, the Administrative Law Judge will make additional findings consistent with that evidence and a review of the record before the IHO. In addition, these additional findings will consider challenges made by the District to certain findings of the IHO, based upon the record before the IHO and the evidence adduced at the December 4 hearing.

FINDINGS OF FACT

The following Findings of Fact were made by the IHO. These findings have not been challenged by the parties and the Administrative Law Judge adopts them for the purpose of this review:

G[redacted] was 17 years old at the time of the hearing, and is now 18. He lives within the District with his parents and younger brother in Evergreen, Colorado. G[redacted]'s condition is "multiply handicapped", which means he has two or more disabling conditions which inhibit his education, one of which is cognitive impairment (mental retardation). In addition to a mental disability, G[redacted] has speech and some degree of motor skills disabilities.

G[redacted] functions overall at a 2- to 3-year-old level. He is unable to recognize numbers, differentiate coins, tell time, or recognize letters of the alphabet, although he can recognize his written name and certain other "sight words." He is unable to write or trace and his speech is limited and difficult to understand. Unless directed, G[redacted] does not go to the toilet and he must therefore wear a diaper. His strengths at school are a gentle and compliant personality and a willingness to try new tasks.

In November, 1991, G[redacted] and his family moved to Evergreen from Georgia. Based upon discussions with his parents and a review of his prior school records, the District made a "direct placement" of G[redacted] in a program known as the "Challenge Program" at Golden High School in Golden, Colorado. G[redacted] has been attending school in the Challenge Program since December 2, 1991. Golden High School is not the school G[redacted] would attend if he were not disabled; his neighborhood school is Evergreen High School.

Over the past two years, the Challenge Program at Golden High has served 11 and 12 students. These students are between the ages of 14 and 20 and demonstrate a range of disabilities. At one extreme are students who are non-verbal and need restroom help. At the other extreme are students who can read, write and attend classes on their own.

All students in the Challenge Program take part in jobsite training, or "job shadowing," in which they walk to nearby businesses in Golden and perform jobs for approximately two hours per day. In the 1991-92 school year, G[redacted]'s jobsite was mostly at a Pizza Hut, where he vacuumed and swept the floor. He also has delivered newspapers for the Golden Transcript. When he goes to a jobsite, G[redacted] is accompanied by either the teacher or one of three paraprofessionals[1]. Besides "job shadowing," G[redacted]'s school schedule includes "P.E. Plus" (adaptive physical education), in which regular students are paired with special education students; lunch, at which Challenge students sit at a separate table accompanied by two paraprofessionals; and "Independent Living Skills." Every Friday Challenge Program students participate in a variety of recreational activities such as bowling, going to the mall, visiting museums and so forth.

The Challenge Program class is currently taught by Lisa Howes, a certificated teacher, who works with the paraprofessionals. G[redacted] also receives related services from two itinerant specialists: a speech/language specialist and a motor skills professional. These itinerant specialists visited Golden High School one-half day per week last year. G[redacted] is not integrated into regular academic classes.

G[redacted] is transported to Golden by bus each day. The trip requires one hour in the morning and one-half hour in the afternoon. He has limited opportunity to participate in regular school activities because he does not live in the Golden High School neighborhood. Outside of school G[redacted] has no social contact with his peers from Golden High School.

Evergreen High School offers three levels of service for special education students. One of these levels is Significant Limited Intellectual Capacity ("SLIC"). Students with limited intellectual capacity eligible for special education services at Evergreen High School are characterized as at least "educably mentally handicapped." G[redacted] is characterized by the District as falling below that level, as "trainably mentally handicapped."

Each student's program at Evergreen is individualized, consisting of a mix of aids and services deemed to be of benefit, including work within itinerant specialists, resource rooms and integration into regular classes. There is no Challenge Program at Evergreen High and P.E. Plus is not offered. The SLIC teacher at Evergreen High School, Peggy Hansen, has the same certification as Lisa Howes at Golden High School. Speech/language and motor specialists are not assigned to Evergreen High on a regular basis, but are provided on an itinerant basis when required by a student's Individual Education Program ("IEP").[2]

When G[redacted] entered the District, no new assessment or evaluation was made. His initial placement at Golden High School was made at a meeting of school officials with his parents on December 2, 1991. The District's officials told the parents that there was currently no program available for G[redacted] in Evergreen, although there were four students who might constitute a class the following year. The parents agreed to the direct placement at Golden High School on the understanding that this was a temporary placement, until the end of the school year.

The parents told Lisa Howes and other school officials that due to their recently acquired jobs they would be unable to miss work to attend [redacted]'s formal staffing at which an IEP would be developed. The parents indicated that they merely desired to review the IEP after it was prepared. On February 10, 1992, Lisa Howes notified the parents that the IEP staffing would take place at 8:00 a.m. on February 14. Howes knew of the parents' difficulty with missing work, but did not telephone them or otherwise attempt to schedule a mutually satisfactory time so that the parents could participate in this conference.

The staffing took place on February 14, 1992. The resulting IEP consists of two documents: a statement of goals and objectives and a report of the initial staffing. The IEP is described as "functional," intended to provide [redacted] with a variety of generalized basic skills necessary to function at home and in the community. Only two placement options were considered for [redacted]. The District did not consider or discuss with the parents whether [redacted] could receive an appropriate education at Evergreen High School. The IEP recommended placement of [redacted] in the Challenge Program.

Although the information contained in the documents substantially complies with several of the requirements of an IEP, the documents do not by their terms contain a statement describing transition services to be provided. At the time of the staffing, [redacted] was at an age where transition services were to be provided and, pursuant to a 1991 amendment to the Act, the IEP was to contain a statement of needed transition services.[3]

Although the IEP does not contain a description of transition services, as defined by the Act,[4] the IEP does contain language which appears to address transitional needs, such as increasing community awareness, developing daily living skills and learning how to pay for purchases. The IEP does not identify a specific environment to which [redacted] will move after graduation and further does not designate a specific outcome for him at age 21. Nor does the IEP contain any coordinated set of activities for meeting a specific outcome. In short, the IEP does not contain a statement of transition services as defined and required by the Act.

Finally, the IHO made the following findings regarding the ability of the staff at Evergreen High School to provide services pursuant to [redacted]'s IEP:

a. Work experiences in the community are identified for students.

b. The special education teachers at both Golden High School and Evergreen High School hold the same certification. However, none of Evergreen's special education staff has the background to deal with severely handicapped students.

c. Because the teachers at the two high schools hold the same certification, Evergreen High School possesses staff who are qualified to deliver educational services, including transition services, to G[redacted].

ADDITIONAL FINDINGS OF FACT

The Administrative Law Judge makes the following Additional Findings of Fact based upon a review of the record and the evidence presented at the December 4, 1992, hearing:

1. The Administrative Law Judge finds that while the special education teachers at the two schools have the same certification, this fact does not translate into identical ability to deliver services pursuant to G[redacted]'s IEP. Howes, at Golden High School, has experience in teaching severely handicapped students such as G[redacted]. Hansen, at Evergreen High School, does not have the same level of experience with children with G[redacted]'s severity of needs. In addition, the relevant special education teacher at Evergreen is responsible for 50 students, with three half-time aides. At Golden, the teacher is responsible for 11 students.

2. The Challenge Program at Golden High School has developed work experiences for its students over the years, monitors the job-sites, deals with job-site problems and maintains good relationships with employers. These jobs are within two or three blocks of Golden High School. Although one of Hansen's duties at Evergreen High School is to develop suitable work experiences in the community for special education students, the same number of job opportunities does not exist in Evergreen. A teacher in the Challenge Program holds a vocational endorsement; no such teacher is assigned to Evergreen.

3. The IHO found that G[redacted] has very limited ability to generalize; that is, he cannot readily transfer skills from the environment in which he learned them to another environment. There is ample support in the record for this finding. However, while in some instances G[redacted] is unable to generalize from the learning environment to another environment, in other instances he has demonstrated the ability to generalize at least relatively simple tasks across a variety of settings or environments. Thus, while G[redacted]'s ability to generalize is limited, he does have some positive generalizing skills.

4. The expert witnesses who testified at the December 4 hearing were in disagreement as to whether [redacted]'s limited ability to generalize required that transition services be provided only in Evergreen (assuming that [redacted] would live in Evergreen after he left high school). Witnesses on behalf of [redacted] and his parents testified that the best practice would be to provide these transition services in Evergreen and that he would receive no benefit from these services if provided at Golden High School. The expert witness on behalf of the District testified that, except in the case of certain profoundly disabled children who require services in only a specific setting, students in general should be trained in more than one job or one job environment and should have access to a number of environments. [redacted] is not, in the opinion of this witness, a child who requires services in a specific setting. In the opinion of this witness, in order to teach students to generalize it is necessary to provide experiences across a large range of settings. In view of [redacted]'s possession of some positive generalizing skills, this witness was of the opinion that the better approach would be for [redacted] to learn in a number of environments, rather than to limit all of his transitional skills learning to a single community.

THE IHO'S CONCLUSIONS AND DECISION

Based upon the Findings of Fact made by the IHO, the IHO reached the following Conclusions of Law:[5]

1. [redacted]'s IEP did not identify a specific environment to which he would move after graduation, nor any specific outcome designated for him at age 21. His interests and needs with respect to such an outcome are not indicated in the IEP, nor has any coordinated set of activities been designed for him to meet his specific outcome. Therefore, [redacted]'s IEP contains no statement of transition services as required by 20 U.S.C. Section 1401(a)(20)(D) and the State Plan.

2. In order to confer some educational benefit, any statement of transition services developed for [redacted] must be predicated upon his limited ability to generalize. To the extent possible, a coordinated set of activities must be planned to include community experiences and the development of employment and other adult living objectives in [redacted]'s specific post-school environment, not just in the community in general. As of 1992-93, that post-school environment is Evergreen, Colorado, not Golden, Colorado. At the least, visits to [redacted]'s post-school environment will be necessary to effect a successful transition.

3. Because the IEP lacks a statement of transition services, it cannot be determined whether [redacted] can receive an appropriate education in the least restrictive environment in Evergreen or in

Golden. Until the full IEP is developed, no conclusions can be reached in this respect.

4. Aside from the lack of transition and extended school year services,[6] and without reference to the issue of the least restrictive environment, [redacted] is receiving an appropriate education in the Challenge Program. The program's focus on assisting him to generalize skills, by providing a variety of community experiences, provides more than de minimus benefit to [redacted].

5. [redacted]'s placement in the Challenge Program was made without consideration of whether [redacted]'s needs could be met at Evergreen High School, with the use of supplemental aids and services. Placement in the Challenge Program was thus predetermined and was made as a result of a category of handicapping condition or configuration of a service delivery plan, in violation of the State Plan and federal regulations.

6. The IEP staffing team should determine the transition services to be delivered and the least restrictive environment in which they should be provided. Nevertheless, only experiences in [redacted]'s specific post-school community would be appropriate and transition services must be focused on Evergreen.

7. The District did not make the attempts required by law to inform the parents of the IEP staffing meeting or to accommodate their right to participate in that meeting at a mutually agreed upon time and place. Because the parents were unable to attend, the District was required to use other methods to ensure their participation. If the parents can attend a new IEP conference only on weekends or evenings, those needs are reasonable and must be accommodated by the District.

8. The District failed to provide a free appropriate public education under the Act by failing to provide an IEP which makes provision for transition services.

On the basis of the above findings and conclusions, the IHO ordered that an IEP team, including the parents, should reconvene within ten days at a mutually convenient time and place and prepare a new IEP providing for extended school year and transition services, consistent with the findings and conclusions contained in the IHO's decision. Determination of the least restrictive environment was to be made by the IEP team. [redacted] was to be placed in the Challenge Program only after consideration of the spectrum of all appropriate alternatives available at Evergreen High School, and only if required by his IEP.

DISCUSSION

The IHO remanded this matter for the convening of a new IEP staffing. In doing so, she mandated that with regard to transition services the team base the IEP on certain findings and conclusions. The District does not appeal the conclusion that transition services were not stated in the IEP, nor does it contest the remedy of remand for a new staffing. The District does, however, take issue with the IHO's requirement that certain matters be considered as established for the purpose of developing an IEP. The essence of the parents' appeal is that as a matter of law [redacted]'s placement is at Evergreen High School and that no new staffing is required.

If the parents are correct that as a matter of law [redacted]'s placement must be at Evergreen High School, there is no need to address the issues in the District's appeal. Accordingly, the Administrative Law Judge will first consider whether [redacted]'s placement is required by law to be at Evergreen High School. If that is the case, the matter is at an end. If it is concluded that placement at Evergreen High School is not legally mandated, but that a new staffing is required to determine placement, it will be necessary to address the District's appeal regarding the method in which the new IEP staffing is to proceed.

I. Statutory and Regulatory Background

A. The Act requires that handicapped students receive a free appropriate public education. 20 U.S.C. Section 1401 et seq. In Rowley the Court held that the Act's minimum requirement is that the state provide a handicapped student with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. Rowley, supra at 201. Rowley established that if a state educational agency complies with the procedures of the Act, and if the IEP developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefit, the state has complied with the Act. Rowley, supra at 206-07; see also Barnett v. Fairfax County School Board, supra at 152-53; Cain v. Yukon Public Schools, District I-27, 775 F.2d 15 (10th Cir. 1985); Troutman v. School District of Greenville County, EHLR DEC 554:487 (D. S.Car. March 11, 1983). No particular standard of education is mandated by the Act (Rowley, supra at 200) nor is a school district required to guarantee the success of the program. In Re New Trier Township High School District No. 203, EHLR DEC 504:255 (February 19, 1982); 34 C.F.R. Section 300.349 and comment. A school district is required to provide an appropriate education; it is not required to maximize educational opportunity or to provide the best possible education. Rowley, supra at 198-99; Schuldt v. Mankato Independent School District No. 77, 937 F.2d 1357 (8th Cir. 1991), cert. den. 112 S. Ct. 937 (1992); Todd D. v.

Andrews, 933 F.2d 1576 (11th Cir. 1991); Barnett v. Fairfax County School Board, supra at 154; A.W. v. Northwest R-1 School District, 813 F.2d 158 (8th Cir. 1987); Cain v. Yukon Public Schools, District I-27, supra: Lunceford v. District of Columbia Board of Education, 745 F.2d 1577, 1583 (D.C. Cir. 1984).

B. Federal regulations under the Act specifically address placement decisions. An educational placement must be based on a child's IEP and should be as close as possible to the child's home. 34 C.F.R. Section 300.552(a)(2), (3). Unless the IEP requires some other arrangement, a child should be educated in the school that he or she would attend if not disabled. 34 C.F.R. Section 300.552(c). Further, in selecting the least restrictive environment for the student's education, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. Section 300.552(d).

The preference established by this regulation for placing a student in a neighborhood school is not an absolute mandate, but is merely one factor to be considered in a placement decision. Schuldt v. Mankato Independent School District No. 77, supra; Barnett v. Fairfax County School Board, supra; Pinkerton v. Moye, 509 F. Supp. 107 (W. D. Va. 1981); In Re Handicapped Child, EHLR DEC 504:359 (SEA N.Y. 1983). If a student's IEP requires services which cannot be provided in his neighborhood school, a school district may permissibly place the child at another school. Barnett v. Fairfax County School Board, 721 F. Supp. 757 (E. D. Va. 1989), aff'd 927 F.2d 146 (4th Cir. 1991); Troutman v. School District of Greenville County, supra; Pinkerton v. Moye, supra; William A. H. v. School Board of Clay County, EHLR DEC 501:209 (SEA Fla. 1979). A school district is not required to create a program in a neighborhood school where an appropriate education can be provided elsewhere. School Board of Escambia County, 1984-85 EHLR DEC 506:362 (SEA Fla. 1985); William A. H. v. School Board of Clay County, supra; see Troutman v. School District of Greenville County, supra.

In short, where more than one appropriate program exists, the Act and regulations require that the program closest to the child's home be provided. However, where the IEP requires services available at a more distant school, and no school with those services exists closer to the student's home, the more distant school is the appropriate placement. Barnett v. Fairfax County School Board (District Court decision), supra.

II. Placement at Evergreen High School

The IHO found that, except for transition services (which were not included in the IEP), [redacted] is presently receiving an appropriate education in the Challenge Program at Golden High School. There is substantial evidence in the record before the IHO and the Administrative Law Judge to support this finding. G[redacted]'s parents claim, however, that once transition services are factored in, G[redacted]'s inability to generalize renders a placement at Evergreen High School as the only locale at which he can receive educational benefit from his school program.

In addition, the parents assert that even if G[redacted] can receive an appropriate education at Golden High School, his IEP may also be implemented (and an appropriate education delivered) at Evergreen High School, without requiring Evergreen to establish a special program. Under these circumstances, it is argued, the preference for placement is at Evergreen High School, the school closest to G[redacted]'s home. The Administrative Law Judge does not agree that Evergreen High School is the placement mandated for G[redacted] by law.[7]

A. The Act leaves the primary responsibility for formulating an education program to educational agencies, in cooperation with the parents. Rowley, supra at 207; Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988); cert. den. 489 U.S. 1016 (1989); Lachman v. Illinois State Board of Education, supra; A. W. v. Northwest R-1 School District, supra. Reviewing officials should not impose their views of preferable education methods on the educational agencies making those decisions. Cf. Rowley, supra at 207; Schuldt v. Mankato Independent School District No. 77, supra; Manchester School District v. Williamson, 17 EHLR 1 (D.N.H., March 27, 1990); Troutman v. School District of Greenville County, supra. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination school officials are better qualified to make. Barnett v. Fairfax County School Board, supra, 927 F.2d at 152.

The IHO properly found that transition services were omitted from the IEP. However, this procedural defect does not require or enable the Administrative Law Judge to impose his view of the appropriate services on the parties. Rather, the appropriate remedy for this procedural defect is to remand for completion of the IEP. See Schuldt v. Mankato Independent School District No. 77, supra. Hendry County School Board. v. Kujawski, 1986-87 EHLR DEC 558:266 (Fla. App. 1986); In the Matter of a Child with Disabilities, 18 IDELR 1135 (SEA Mo. 1991); School District of the Menomonie Area v. Rachel W., 1983-84 EHLR DEC 505:220, 227 (SEA Wis. 1983); In re Garden City Union Free School District, EHLR DEC 504:357 (SEA N.Y. 1983). It is within the contemplation of the Act that a decision such as this be left, in the first instance, to the members of the staffing team.[8]

G[redacted]'s limited ability to generalize does not change this conclusion; it certainly does not mandate that he be placed at Evergreen High School. Generalization is merely one aspect of the total mix of considerations in determining the appropriate goals, services and placement. To focus solely on that aspect of

G[redacted]'s skills and abilities is to ignore the educational benefits he is able to receive at Golden High School. The IHO and expert witnesses for both parties concluded that the Challenge Program focuses on and assists G[redacted] in his ability to generalize skills. This fact, and other progress he has made in the Challenge Program in meeting his IEP goals, must be considered by the staffing team as one of the many factors entering into the placement determination.

In addition, the expert witnesses disagreed as to whether G[redacted]'s services must be delivered solely in Evergreen in order for him to benefit in more than a de minimus fashion. This type of expert educational debate is best resolved in a staffing, not in an adversarial setting. Even if the parents' experts are correct that the best placement in terms of transition is at Evergreen High School, the Act does not require the best placement; the delivery of educational benefit short of maximum benefit may still comply with the requirements of the Act. See Part I, A of this Discussion, supra. Therefore, the staffing team in the first instance should identify transition services and determine how G[redacted]'s educational goals may be achieved.

Finally, even if certain transition services must be provided in G[redacted]'s home community, and even if that home community is Evergreen, it does not follow as a matter of law that he must attend high school in Evergreen. The IHO correctly noted the possibility that transition services could take place in Evergreen, but be offered from a base in Golden. This is one of the many decisions which are best left to the staffing team. Even accepting the parents' position that G[redacted] must receive services in Evergreen in order to benefit, a placement in Evergreen is simply not mandated as a matter of law.

B. G[redacted]'s parents also argue that even if an appropriate education can be delivered in Golden, it can be delivered in Evergreen as well and in that case the preference is for the school closest to his home. Even assuming that transition services can be delivered in Evergreen, the evidence does not establish that the entire IEP, as presently constituted, can be implemented at Evergreen High School. If in fact the IEP cannot be implemented at Evergreen High School, placement is not required in Evergreen, despite the fact that it is G[redacted]'s home school. See Part I, B of this Discussion, supra.

The IHO found that Evergreen High School possesses staff who are qualified to deliver educational services, including transition services, to [redacted]. However, she also found that none of Evergreen's special education staff has the background to deal with severely handicapped students. Even though the teachers may have the same certification, there are differences in the experience levels of these teachers. Further, the teacher/student ratio at Evergreen High School is more than four times that in the Challenge

Program and there are approximately the same number of paraprofessionals at Evergreen to deal with a substantially larger number of students.

In addition, the parents' assertion that even the District's expert agrees that [redacted]'s program could be implemented in Evergreen is not accurate. The District's expert did not so state in an unqualified manner. She did testify that, as far as she knew, the goals in [redacted]'s IEP which are transitional in nature could be provided at Evergreen High School. She also qualified her opinion by questioning whether the same vocational and other opportunities available in the Challenge Program were also available in Evergreen. In this regard, the expert witness noted the possibility of a shortage of available job opportunities for special education students in Evergreen.

The initial IEP staffing team did not consider Evergreen as a potential placement for [redacted]. Therefore, they have not taken the opportunity to review the various factors discussed here to determine whether his IEP can be delivered in Evergreen once transitional services have been identified. As above, this is a decision which should first be made by the staffing team. Once transitional services are identified, and once the staffing team considers whether required IEP services can be delivered in Evergreen and [redacted]'s goals can be met at that school, the staffing team can decide whether Evergreen is an appropriate placement. Until such determinations are made it cannot be said as a matter of law that Evergreen High School is able to deliver the appropriate services. If those services cannot feasibly be delivered at Evergreen, placement at Evergreen is not required.

III. The District's Appeal

Having determined that placement at Evergreen High School cannot be mandated upon state level review, it is necessary to turn to the issues raised by the District which impact upon the remand for a new staffing. At the outset, it should be noted that two issues raised in the District's appeal do not require decision.

First, the District argues that the IHO improperly concluded that placement in the Challenge Program was predetermined and made as a result of a category of condition or configuration of service delivery system. This conclusion was based on the fact that services at Evergreen High School were never considered by the District. Because it has been determined that a new staffing must be convened, it is not necessary to address this precise issue. Whether in the initial staffing [redacted] was labeled with a handicapping condition and placed in a program designed to serve students with that condition is at this point not important. As a factual matter, the District did not seriously consider Evergreen High School as an option. The Act and regulations require that each child's needs be looked at individually and that all reasonable options, including placement in the school closest to the student's home, be considered. Rowley, supra, at 201; 34 C.F.R. §§300.551, 552. In light of the evidence regarding generalization, Evergreen must logically be considered as a potential placement, along with other options on the continuum of alternative placements. The District must therefore consider Evergreen as a potential placement in the new staffing. Resolution of the legal issue raised here is not otherwise required.

Second, an issue involving extended school year ("ESY") services was resolved by stipulation of the parties and was not properly before the IHO. Accordingly, that issue is not a matter requiring any determination upon this review. Prior to the hearing, the parties entered into a stipulation in which the District acknowledged that the parents alleged there was a failure to properly assess whether [redacted] was eligible for ESY services. The District offered to reconvene the staffing team for the purpose of reviewing [redacted]'s eligibility for ESY services. It was further agreed that if the staffing team determined that [redacted] was eligible for ESY services, that determination would be applied retroactively and an appropriate compensatory program would be developed. This stipulation was read into the record at the outset of the hearing before the IHO.

In the stipulation, the parties agreed only that a staffing would reconvene to determine whether [redacted] was eligible for ESY services. However, the IHO's decision went beyond the parties' resolution of this issue and ordered the IEP team to "prepare a new IEP providing for ESY and transition services." The District appeals the order to construct an IEP providing for ESY services and the parents, in essence, confess the IHO's error in this regard. No contested issue thus appears regarding ESY services. The staffing team must consider [redacted]'s eligibility for ESY services pursuant to the stipulation.

Having disposed of these two matters, a number of issues raised by the District remain for determination upon this review.

A. The IHO concluded that the District never considered whether [redacted]'s needs could be met at Evergreen High School "with the use of supplemental aids and services there." The IHO also directed that the new staffing be consistent with the findings and conclusions of her decision. The District asserts that it is not required to consider whether the use of supplementary aides or services at Evergreen High School can render that school appropriate for the implementation of [redacted]'s IEP.

The IHO did not describe what she meant by "supplementary aids or services" and the parties themselves do not seem to agree on the meaning of that term. The District argues that it is entitled to cluster special education services at a single location, such as the Challenge Program, and is not required to duplicate those services at other locations so that a child will be able to attend his neighborhood school. The parents, on the other hand, do not argue that the District must duplicate services or add resources at Evergreen High School in order to accommodate G[redacted]'s needs. Rather, they state that the IHO only required the District to consider utilizing supplemental aids and services already available at Evergreen High School.

Neither the IHO nor the parents disagree with the District's position that it is entitled to cluster services at a particular location for the purpose of avoiding the cost of duplicating these services in several schools. There is substantial legal authority in support of doing so.[9] As the Administrative Law Judge reads her decision, the IHO required the District to consider supplemental aids and services already available at Evergreen High School and whether these could be utilized to implement G[redacted]'s IEP.[10]

In deciding upon an appropriate placement, it is necessary to determine if services available at a school other than the neighborhood school, which make that placement a superior locale for providing educational services, can feasibly be provided in the neighborhood school. See A.W. v. Northwest R-1 School District, supra; Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983). It was thus within the authority of the IHO to require the District to consider whether services already available to Evergreen High School could feasibly be utilized in the implementation of G[redacted]'s IEP. In the newly convened staffing, this matter must be considered.

B. The IHO found that because the teacher in the Challenge Program holds the same certification as the special education teacher at Evergreen High School, Evergreen High School possesses staff qualified to deliver educational services to G[redacted], including transition services. The District maintains that the IHO erred in concluding that the Evergreen staff is qualified to deliver these services. The District argues that factors beyond the mere certification of the teachers must be considered in assessing the qualifications of the staff at Evergreen. These factors include the ratio of teachers and aids to students, the presence of a teacher with a vocational endorsement at Golden High School and the unique management role regarding community-based experience which can be provided by the teacher in the Challenge Program.

As discussed above, whether Evergreen High School can feasibly provide the services required by G[redacted]'s IEP is a matter which must be considered by the IEP staffing team. The mere fact that the teacher at Evergreen High School has the same certification as the Golden teacher does not mean that Evergreen High School is necessarily the appropriate placement. The IHO implicitly recognized this fact by finding that the Evergreen special education staff did not have the background to deal with severely handicapped students. Further, the Administrative Law Judge has found that due to different class sizes and experience levels, the identity of certification does not translate into identical ability to deliver services. Upon remand, the staffing team will have to consider all of these factors in determining the appropriate placement.

The parents argue that the District violated its own policy of a "needs based approach." That policy provides for a determination of the appropriate number of staff members needed in each building to provide the services identified for handicapped children assigned to that building. However, this policy does not mean that the District is unable to cluster services in a specific building and assign children to that building. As determined above, the District may do so under the Act. This policy cannot be read to require the District to provide all necessary services for each handicapped child at his or her neighborhood school.

Whether the IHO erred in concluding that the staff at Evergreen is qualified to deliver educational services is not the issue. The fact that the staff is qualified by endorsement is not a determinative factor, but is only one matter to be considered, among others discussed here. Upon remand, the staffing team must consider all of these facts in determining the feasibility of placement at Evergreen.

C. The IHO directed that upon remand the staffing team should specifically identify [redacted]'s post-school environment. The District asserts that the IHO did not have the authority to require that a statement of transition services identify a specific environment to which the child will move after graduation. The Administrative Law Judge disagrees with the District's position.

20 U.S.C. §1401(a)(19) defines the term "transition services" as:

> a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including . . . vocational training, integrated employment . . . . adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives. . . . (Emphasis added).

As demonstrated by the emphasized portions of the statute, transition services are to be outcome oriented and must take into account a student's specific circumstances. These circumstances include the student's preferences and interests, as well as the need for community experience and the development of employment and other post-school living objectives. These requirements highlight the importance of at least identifying the student's preference for a post-school environment and determining the extent to which community-specific experience in that environment is feasible or necessary to provide a meaningful education.

This is not to say that the identification of a post-school environment requires placement in that environment or that services must be delivered in that environment. However, the staffing team cannot rationally develop an IEP which includes transition services as defined by the Act and which will provide educational benefit to the student without at least considering the location of his post-school environment. Therefore, the IHO did not commit error in requiring the staffing team to identify this environment.

D. The IHO found that as identified in 1992-93, [redacted]'s post-school environment is Evergreen, not Golden. She further concluded that transition services be focused on Evergreen. The District asserts in its appeal that the IHO intruded into the domain of the staffing committee when she made these determinations. The Administrative Law Judge agrees with the District's position.

The issue before the IHO, as stated by the parents, was whether the District had violated [redacted]'s right to a free appropriate public education by failing to assess, make IEP provision for and provide transition services. The IHO determined that in fact a free appropriate public education was not provided due to this failure. At that point, the IHO properly remanded the matter to the District to conduct a staffing at which these services would be identified.[11]

The IHO's finding that, as of 1992-93, [redacted]'s identified post-school environment was Evergreen was based upon substantial evidentiary support. Unless new information regarding the post-school environment is provided to the staffing team, it is difficult to visualize that team reaching some other conclusion. Nevertheless, that determination is one, as with other determinations upon remand, which is most properly made by the staffing team.

Similarly, the IHO exceeded her authority in directing the staffing team to focus transition services on Evergreen. While such a focus might be appropriate, it is for the staffing team in the first instance to determine what components are necessary to provide [redacted] with a free appropriate public education. The determination of how to deliver an appropriate education under the Act involves numerous educational decisions and assessments which are best left, at this stage, to the District.

The record indicates that serious consideration must be given to the location of service delivery. However, this fact does not outweigh the appropriate process which, in the view of the Administrative Law Judge, is to remand the case for a determination by the staffing team based upon consideration of all relevant factors.

E. The IHO found that in order to confer educational benefit transition services for G[redacted] must be predicated upon his limited ability to generalize. The record does not support the parents' contention that G[redacted] is wholly unable to generalize and transfer complex skills, and that was not the finding of the IHO. However, there is ample support for the finding that G[redacted]'s abilities in this regard are limited.

In determining the nature, extent and location of transition services, the staffing team will logically need to consider G[redacted]'s limited ability to generalize. However, it is beyond the province of the IHO to state that transition services must be predicated on this limited ability. While this fact is one to be given consideration, among the many matters to be weighed in developing an IEP, to the extent that "predicate" implies the sole basis for identifying transition services, such a directive is beyond the province of the IHO. The extent to which G[redacted]'s ability to generalize is limited, and the impact of that limited ability on the development of the IEP, are matters to be determined in the first instance by the staffing committee.

F. The IHO concluded that the District did not make the required effort to accommodate the parents' right to participate in development of the IEP. Accordingly, the IHO ordered that if the parents could attend a conference only on weekends or evenings, the District must accommodate that need. The District argues that the IHO had no authority to require such an accommodation. The Administrative Law Judge concludes that, under the specific facts of this case, the IHO was authorized to require holding an IEP conference on a weekend or evening, if necessary.

The regulations promulgated pursuant to the Act reflect that parental participation in development of an IEP is a matter of great importance. 34 C.F.R. §300.345(a) requires the District to take steps to ensure that one or both parents are present at each meeting or are afforded the opportunity to participate. One of the steps the District is required to take is to schedule meetings at a mutually agreed upon time and place. 34 C.F.R. §300.345(a)(2). If neither parent can attend, the District is required to use other methods to ensure their participation, including individual or conference telephone calls. 34 C.F.R. §300.345(c). Further, if a parent is unwilling to attend, a school district is required to attempt to convince the parents that they should attend. 34 C.F.R. §300.345(d). Taken together, these regulations emphasize the importance of parental participation in the IEP staffing. .

The District's efforts in this case fell short of the requirements of the regulations. The District merely accepted the statement of the parents that they would be unable to attend the staffing. No efforts were made to convince the parents that they should attend, to mutually agree upon a time and place or to use other methods to ensure parental participation.

The Act places tremendous emphasis on procedural requirements. Due to the lack of a specific substantive educational standard, meaningful parental participation is crucial to the Act's structure. As the Court stated in Rowley:

> When the elaborate and highly specific procedural safeguards embodied in [the Act] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard. Rowley, supra at 205-06.

Considering the importance of adherence to procedural requirements regarding parental participation, the District's failure to comply with these procedures requires appropriate remediation. Given the difficulties in accommodating the parents' schedule, and the District's prior lack of effort in doing so, every reasonable effort must be made to ensure the parents' attendance at the new staffing ordered by the IHO. If the parents attend the staffing it is possible that a placement or services agreeable to all parties can be established and that further adversary proceedings will be avoided. In the absence of the parents, there is a danger that the process of appeals will be repeated. The participation of the parents is thus of utmost importance.

Because of the importance of parental participation and the District's past failure in this regard, it is not unreasonable to require the District to make its personnel available on an evening or weekend if absolutely necessary to accommodate the parents. The parents, too, must make efforts to be available at a reasonable time and place; the District is not required to accede to unreasonable parental requests. However, if no other alternative is feasible, the District is required to accommodate the parents by holding a conference on an evening or weekend. Such a result is necessary to remediate the District's prior violation.[12]

In so holding, the Administrative Law Judge does not suggest that in all cases school districts are required to accommodate parents by holding IEP meetings on weekends or evenings. This decision is limited to the particular facts of this case.

DECISION AND ORDER

It is the decision of the Administrative Law Judge that this matter be remanded to the District to conduct a new staffing and develop an IEP consistent with this decision, and also consistent with the decision of the IHO (to the extent that the IHO's decision is not affected by this order). The staffing shall take place within 15 days of the date of this decision. The Administrative Law Judge realizes that from the standpoint only of efficiency it might be preferable (particularly to the parents) to decide the issue of placement in this state level review. The possibility exists that the parents may not be satisfied with the placement decision of the staffing team upon remand and that new appeals could follow.[13] Nevertheless, the Administrative Law Judge cannot order a placement without providing a full opportunity to the District to generate an IEP in compliance with legal procedures. To do otherwise would be to substitute the Administrative Law Judge's judgment for that of the service providers in a circumstance where, as shown by the evidence, there is room for reasonable disagreement among experts in the field. As long as the law does not require a placement in Evergreen (as concluded here, based upon the present record), remand for a new staffing is the only appropriate result.[13]

This decision of the Administrative Law Judge is the final decision on state level review. State Plan, Part II, Section B, VII, B 10.

DATED AT: Denver, Colorado

February 10, 1993.

Marshall A. Snider
MARSHALL A. SNIDER
Administrative Law Judge

FOOTNOTES

1/ There are three paraprofessionals in the Challenge Program this school year. Last year there were four paraprofessionals in that program.

2/ An Individual Education Program is a written statement for each handicapped child, developed at a staffing. This document is required to be designed for the unique needs of the child and includes a statement of measurable educational goals and needed services, plus a method of annual evaluation of the student's program. 20 U.S.C. §1401(a)(20) (1991 Supp.); 34 C.F.R. §300.340 et seq.

3/ 20 U.S.C. §1401(a)(20)(D) (1991 Supp.).

4/ 20 U.S.C. §1401(a)(19) (1991 Supp.). Transition services are defined as a coordinated set of activities designed within an outcome oriented process which promote movement from school to post-school activities.

5/ Some of the IHO's conclusions of law were denominated as findings of fact. However, these findings were stated in terms of legal standards and are thus conclusions of law, or at least mixed statements of fact and law. See Blaine v. Moffat County School District RE-1, 748 P.2d 1280, 1287 (Colo. 1988); Ricci v. Davis, 627 P.2d 1111, 1118 (Colo. 1981).

6/ As will be discussed below, the matter of whether Gregory is entitled to extended school year services is not an issue in this review.

7/ For the purpose of this discussion, the Administrative Law Judge assumes, without deciding, that he has the authority to order a particular placement for [redacted].

8/ If a school district violated the Act and regulations on one or more occasions, under circumstances giving rise to an inference of bad faith or willful disregard for its responsibilities, it would arguably be appropriate for an IHO, a state educational agency or a court to make a placement determination without allowing the district a further opportunity to take action in compliance with the Act. The present case, however, does not include such bad faith or willful disregard by the District.

9/ See Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir. 1991), cert. den. 112 S. Ct. 175 (1991); Troutman v. School District of Greenville County, EHLR DEC 554:487 (D.S.

Car., March 11, 1983); Pinkerton v. Moye, 509 F.Supp. 107 (W.D. Va. 1981); School Board of Escambia County, 1984-85 EHLR DEC 506:362 (SEA Fla. 1985); In the Matter of Cabarrus County Schools, 3 EHLR 502:218 (SEA N. Car. 1980).

10/ For example, Evergreen High School has access to the same itinerant services as are utilized by [redacted] at Golden High School.

11/ See Section II, A of this Discussion regarding the propriety of remanding this matter for a staffing.

12/ The Administrative Law Judge is authorized to provide an appropriate remedy for violations of the Act, similar to the power of a district court to provide appropriate relief. See 20 U.S.C. §1415(e)(2). It would make little sense to establish appeals to IHOs or state level officials if those reviewing officers could not require a school district to comply with the Act and its regulations.

13/ It is not necessary that such a result occur: a new staffing could place [redacted] at Evergreen High School, or in Golden with services which satisfy his parents.

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by depositing same in the U.S. Mail, postage prepaid, at Denver, Colorado to: William R. Baesman and Nina H. Kazazian, Attorneys at Law, 1401 17th St., #1100, P.O. Box 17180, Denver, CO 80217-0180; and to Alan J. Canner, Esq., 2595 Canyon Blvd., #400, Boulder, CO 80302-6737; on this 11th day of February, 1993.

Peggy Buyaki
Secretary to Administrative Law Judge

ed9204.dec/ce

Case Number: L92:116

Status: Impartial Hearing Officer Decision

Key Topics: Least Restrictive Environment (LRE)
Procedural Safeguards (Notice)

Issues:

- Whether the IEP is complete and contains appropriate goals and objectives.
- Whether the district implemented the IEP.
- Whether the District educated the student in the LRE.
- Whether the parent received sufficient notice that the disabling condition would be changed on the IEP.

Decision:

- The goals and objectives in the child's IEPs are appropriate and the IEPs have been fully implemented.
- The child has been educated in the least restrictive environment.
- Proper notice of the staffing meeting was given to the parents.
- The disabling condition on the IEP is correct.
- The District shall provide the student with an independent evaluation.
- The District shall convene the staffing after all assessments are available.

Discussion:

- Parameters for developing goals and objectives.
- IEP is not a guarantee of a specific level of educational achievement.
- Nature of notice required before IEP meetings.

INTRODUCTORY STATEMENT

The hearing was held on October 15 and 16, 1992, at the West Area SERS offices of the Jefferson County School District R-1. Jurisdiction is conferred by 20 U.S.C. § 1450, 34 C.F.R., § 300, et seq., and part VII of the current Colorado Department of Education State Plan. The Petitioners (parents) appeared pro se. The Respondent was represented by Alan Canner, Attorney at Law, of the law firm of Caplan and Earnest, 2595 Canyon Boulevard, Suite 400, Boulder, Colorado 80302-6737.

The hearing was held pursuant to a request by the Petitioners on August 21, 1992. The issues to be determined, which were agreed to by the parties at a prehearing conference, are as follows:

a. The District has not paid for evaluations performed at Children's Hospital on the child as it has agreed to do in the Memo of Understanding dated January 3, 1992.

b. The current I.E.P. is incomplete.

c. The I.E.P.'s promulgated since 1990 have not been implemented.

d. The goals and objectives in the I.E.P.'s since 1990 are inappropriate.

e. The District has failed to educate the child in the Least Restrictive Environment.

f. The District did not provide proper prior notice before making changes in the identified handicap in the I.E.P.

g. The currently identified handicapped condition and the current I.E.P. is incorrect because they say that the child has a significant identifiable emotional disorder instead of a speech and language handicap.

The first of the identified issues, designated as a., above, was resolved during a mediation session held between the parties on October 8, 1992. By signed Memorandum of Agreement, the Student's parents expressly agreed to remove that issue as one to be considered at the due process hearing. A copy of the Memorandum of Agreement, dated October 8, 1992, was presented to the Hearing Officer at the outset of the due process hearing, conducted on October 15 and 16, 1992.

At the prehearing conference a briefing schedule was agreed to and both parties filed their briefs timely.

FINDINGS OF FACT

1. The child is a 9-year-old student initially referred for a special education assessment in the fall of the 1990-91 school year, during which time the Student was in the second grade at Kendrick Lakes Elementary School in the School District. See Respondent's Exhibits A, B, and C. After a multidisciplinary assessment, see Respondent's Exhibits D and F, an initial individualized educational program ("IEP") staffing was convened on November 27, 1990, see Respondent's Exhibits E and G. At that time, the Student was found to have a handicapping condition, identified as "speech/language." Annual measurable goals, specific objectives, and characteristics of service were identified on the staffing forms. The child's parents subsequently gave signed consent for the Student's placement in the designated special education programming. See Respondent's Exhibit H.

2. On November 26, 1991, the first annual review was conducted concerning the child, now a third grader at Kendrick Lakes. The handicapping condition was again identified as "speech/language," annual goals and objectives were stated, and characteristics of service similar to those developed during the initial staffing were indicated. See Respondent's Exhibit J.

3. In late January, 1992, the Student's parents requested that the Student be withdrawn from that portion of the child's special educational placement that involved services delivered in the "EH Lab." See Respondent's Exhibit M.

4. In response to parental request, another review was conducted on February 11, 1992. *See* Respondent's Exhibits L and O. In compliance with the parents' wishes, the newly devised IEP resulting from that meeting did not contain a goal, objectives, or related characteristics of service that would have implicated a continuation of service delivery through the EH Lab. *See* Respondent's Exhibits O and P.

5. A subsequent reconvening of the staffing team on March 10, 1992, resulted in an addendum to the placement plan on the February 11, 1992, IEP, adding counseling services. *See* Respondent's Exhibits O and Q.

6. The child's parents subsequently submitted to the School District the reports from a comprehensive independent educational evaluation that had been conducted *at their request* at The Children's Hospital. *See* Respondent's Exhibits R, S, and T.

7. At a conference convened on June 1, 1992, for the purpose of reviewing the assessment reports from The Children's Hospital and to "plan for next year," *see* Respondent's Exhibit W, a new IEP document was developed, *see* Respondent's Exhibit X. That June 1, 1992, IEP indicates "significant identifiable emotional disorder" ("SIED") as the Student's primary handicapping condition, a change from the previous handicapping condition of speech/language.

8. Following that staffing conference, the parents enrolled the Student during the summer of 1992 as a transfer student at Green Mountain Elementary School, another school of the School District.

9. By letter dated August 17, 1992, the parents sent to the School District's Superintendent a formal request for a due process hearing. *See* Respondent's Exhibit Z.

DISCUSSION AND CONCLUSIONS

I. Are the Goals and Objectives stated in the child's IEP's from 1990 to June 1, 1992, appropriate?

The Colorado State Plan for Fiscal Years 1992-94 at V.E.2.f.(5) and (8) states that the functions of the staffing/IEP committee are to "[p]rioritize and cluster identified needs into annual goals," and to "[d]evelop: (a) [s]hort-term instructional objectives based on the established annual goals." Each of the Student's IEPs contains statements of annual measurable goals, derived from the identified needs, and at least one stated objective for each such goal. See Respondent's Exhibits G, J, O, and X.

Appendix C to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. ("IDEA") regulations provides the following discussion of "annual goals" and "short term instructional objectives":

> The annual goals in the IEP are statements which describe what a handicapped child can reasonably be expected to accomplish within a twelve month period in the child's special education program. . . . [T]here should be a direct relationship between the annual goals and the present levels of educational performance.
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> * * *
>
> "Short term instructional objectives" (also called "IEP objectives") are measurable, intermediate steps between a handicapped child's present levels of educational performance and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals.
>
> In some respects, IEP objectives are similar to objectives used in daily classroom instructional plans. . . .
>
> In other respects, objectives in IEPs are different from those used in instructional plans, primarily in the amount of detail they provide. IEP objectives provide general benchmarks for determining progress toward meeting the annual goals. . . . Classroom instructional plans generally include details not required in an IEP. . . .

34 C.F.R. Part 300, Appendix C, questions 38 and 39.

A review of the goals and objectives stated on the various IEPs developed for the child indicates that each satisfies the definitional discussions contained in the federal regulations quoted above.

The testimony adduced from all those School District witnesses who were involved in the development of each of these IEPs is uncontroverted and replete with evidence that discussions occurred at each IEP conference at which the present levels of the child's functioning were discussed and available assessment information was reported; at which all members of the conference, *including parents*, had a full opportunity to state any presenting needs of the child as perceived by the speaker; and at which various members of the conference articulated broad goal statements intending to encompass various of the identified needs, from which were developed more specific instructional objectives directly related to the particualr goal statement.

A review of these IEP documents demonstrates that, indeed, the goal statements bear a direct and unmistakable relationship to the various statements of the child's needs. Moreover, a similar review unmistakably demonstrates that the objectives articulated for each goal present a logical breakdown of major components of the relevant annual goal.

All School District witnesses who had participated in their professional roles as members of the IEP staffing committees reasserted under oath at the hearing that they considered the goals and objectives developed for the child to be appropriate. Given the Courts' repeated articulations that deference is to be given to the educational decisions of the professional educators, and the Supreme Court's pronouncement that the purpose of the IDEA is to do no more than to provide access to a specialized instructional program designed "to provide educational benefits" to a student with disabilities, *Board of Education, Etc. v. Rowley*, 458 U.S. 188 at 202, the Petitioners have fallen short of demonstrating that the goals and objectives developed by the IEP staffing teams are inappropriate.

II. Have the child's IEP's from 1990 to June 1, 1992 been implemented?

The "implementation" of the child's IEPs must be judged in relation to the indicated characteristics of service and placement plans appearing on those several documents. Typically, these portions of the document have specified the particular service to be given, the kind of setting (i.e., type of group) within which the service will be delivered, the frequency or range of minutes for the service, and an initiation date for the service and its anticipated duration. See, e.g., Respondent's Exhibit J at page 4.

Testimony adduced at the due process hearing from the specific persons delivering the described services indicates that those persons did deliver the services to the child within the ranges of minutes, in the meetings, and for the anticipated durations listed on the various IEPs. The child's regular education classroom teacher during the 1991-92 school year corroborated that the child was receiving these services pursuant to the placement plan.

The Petitioners presented no evidence indicating what aspects of the IEPs they allege not to have been implemented, with the exception of documentary evidence suggesting that certain planned meetings with the speech language specialist may have been curtailed. Specifically, Petitioners' Exhibit 4, comprised of notes sent to the child's parents from Kathleen Rust, the speech language specialist who served the child, indicates what may have been as many as six individual sessions between the child and the speech language specialist that did not transpire as planned over a six-month period. The notes indicate that the missed sessions were based, primarily, on Ms. Rust's judgment that the value to the child of particular activities occurring at those times in the child's regular education classroom argued strongly for allowing the child to remain for those activities uninterrupted.

In a letter sent to the child's parents by Ms. Rust on April 15, 1992, at the end of the six-month period represented in the Petitioners' Exhibit 4, Ms. Rust explained to the child's parents that she is altering her meeting time with the child so as to allow the speech language sessions to occur without interrupting important scheduled events in the classroom. See Petitioners' Exhibit 5. Petitioners' Exhibit 5 does not suggest that sessions were missed in addition to those already reflected in Petitioners' Exhibit 4, and indeed, clarifies that the speech language teacher was taking affirmative action to prevent the recurrence of any such absences.

No evidence was introduced to suggest that the child's progress in the area of speech language was in any way compromised as a result of these several missed sessions. Indeed, the Respondent's exhibits demonstrate that objectives for specific speech language skills during this time interval all were either accomplished or partially accomplished. As much as a 1.1 age equivalent growth is indicated in one specific area. See Respondent's Exhibit O, "Goals and Objectives."

The failure of a service provider to work with a child on every occasion delineated for service on an IEP does not rise to the level of a failure to implement the IEP or to provide a free appropriate education.

The federal regulations clearly indicate that the IDEA "does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives. 34 C.F.R. Reg. 300.349. An IEP is not a contract, and it "does not constitute a guarantee that the child will derive a given amount of educational benefit from the services. The [IEP] does not guarantee that the given level of special education services will ameliorate a child's handicapping condition to a specified degree. Rather, the district is bound to provide appropriate services for a child's diagnosed needs in good faith." 1984-85 EHLR DEC. 506:359, :360 (SEA Ill. 1984).

The testimonial and documentary evidence demonstrates that, in fact, the child completed work activities related to the goals and objectives listed in the IEPs and received services consistent with the listed scopes, frequencies, and durations. In light of that evidence, assertions that some few number of planned sessions did not occur or that a particular teacher was ineffective or utilized classroom techniques that the Petitioners believe to be inappropriate are insufficient to demonstrate that the IEPs were not implemented. See e.g. 17 EHLR 962, 963 (OCR 1991).

III. Has the School District educated the child in the Least Restrictive Environment (LRE)?

The IDEA and its implementing regulations mandate placement of children with disabilities in the "least restrictive environment." 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.550(b). This so-called "mainstreaming" requirement of the IDEA has been characterized as evidence of a "very strong congressional preference for mainstreaming," Roncker v. Walter, 700 F2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. §64 (1983); see also Rowley, 458 U.S. at 181 n.4. However, that preference "was not meant by Congress to be implemented in an unqualified manner." Lachman v. Illinois State B'd of Educ., 852 F.2d 290, 295 (7th Cir.), cert. denied, 488 U.S. 925 (1988).

Consistent with the federal statute in this regard, the Colorado State Plan requires that a "continuum of placements" must be available to meet the needs of children with disabilities for special education and related services. Colorado State Plan for Fiscal Years 1992-94, X.A.4; see also 34 C.F.R. § 300.551(a). Accordingly, each of the school District's IEP staffing forms contains a section entitled "Placement Alternatives Considered." See Respondent's Exhibits G, J, O, and X.

As was attested to by each of the School District's professional staff members who participated in the various IEP conferences, all staff understand that a child is to be educated in the least restrictive environment; all understand that requirement to mean that, to the extent appropriate for permitting the child to receive educational benefit, the child is to be removed for the least amount of time from the regular education setting; and all understand that the staffing team's obligation is to begin their review of the placement alternatives with that alternative comprising the least interruption from the regular classroom setting and to end the inquiry at the first point at which it is determined by the team that the child will receive meaningful educational benefit. All School District professionals involved with the staffing conferences agreed that, for this child, in order to supply the degree of programming in the kinds of settings that would allow the child to achieve educational benefit, the placement alternative that was least restrictive would involve regular classroom placement plus resource room plus itinerant specialists.

Testimonial evidence from Ms. Rust, the speech language specialist, also indicated that as the child achieved progress working on the specific speech language objectives that were delineated for her, the possibility became greater that services given by the itinerant specialist could be delivered increasingly within the regular education classroom. Accordingly, the evidence predominantly indicates that the School District personnel were keenly aware of the requirements of educating in the least restrictive environment and, after thoughtful consideration, had determined placement in the environment that provided the least restriction while affording appropriate educational benefit.

IV. Did the School District provide proper notice to the parents prior to convening the conference of June 1, 1992, at which time the Identified Handicapping Condition was changed?

The Petitioners' allegation concerning the appropriateness of the prior notice given for the June 1, 1992, conference (at which a decision was made to change the Student's handicapping condition) apparently involves the specificity with which the purpose of the meeting was indicated on the conference notification form. The notification form, dated May 18, 1992, indicates the purpose of the June 1, 1992, conference is to "[r]eview the Children's Hospital testing (Emphasis supplied) and plan for next year." See Respondent's Exhibit W. This conference notification given to the Student's parents in advance of the June 1, 1992, meeting was pursuant to the requirements of 34 C.F.R. Reg. 300.345, concerning notification to parents in advance of meetings. That regulatory subsection requires that a notice must indicate the purpose, time, and location of the meeting, and who will be in attendance. 34 C.F.R. Reg. 300.345(2)(b); see also 1 Colo. Code Regs. 301-8 § 4.04(7).

Several of the School District's witnesses testified that, in indicating that the purpose included "plan[ning] for next year," the meeting necessarily entailed the development of a new IEP document, involving all its subparts. Additionally, specific testimony was given that the existing IEP expired under its own terms during the last month of the current school year, see Respondent's Exhibit O, and that a new document, therefore, would be required. Testimony from all the participating School District professionals also indicated that none of the professionals had a preconceived notion that a change in the identified handicapping condition would occur at this meeting. In fact, few if any of the School District professionals then had knowledge of the content of The Children's Hospital reports which were to be discussed at that meeting and which served a significant role in the team's determination to reidentify the child's primary handicapping condition on June 1, 1992.

Two other regulatory sections, 34 C.F.R. §§ 300.504 and 300.505, concern prior notices to parents and the content of such notices. Those regulatory sections require written notice of specified content "a reasonable time before the public agency: (1) [p]roposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or (2) [r]efuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child." 34 C.F.R. § 300.504(a). The language of these provisions clearly relates to actions that a school district has decided or refused to take. It does not relate to meetings that have been convened to discuss with parents a student's IEP for the coming year, *including a review of reports on newly completed assessments*, the child's current needs, and the resultant determinations concerning handicapping condition, goals, objectives, and placement plan. *See* 16 EHLR 550, 551 (OSEP 1990) ("[S]uch notice must be given to parents a reasonable time before the agency implements said action, but after the agency's decision on the proposal or refusal has been made. . . . The provisions . . . requiring the notice to include a description of the agency's action and the options the agency considered or rejected . . . clarify that written notice under EHA-B is notice of a public agency's final decision on a proposal or refusal.")

The intent of these regulations is to guard against a school district's taking a unilateral action involving a child without the parents' having been fully informed and having had the opportunity to disagree with the proposed action. *See, e.g.*, *Jacobsen v. District of Columbia B'd of Educ.*, 564 F. Supp. 166 (D.D.C. 1983). Regulations 300.504 and 300.505 do not apply to the June 1, 1992, meeting. Accordingly, the School District did not fail to provide the kind of prior notice required before the June 1, 1992, meeting, even though a determination ultimately was made at that meeting, *at which the parents were in attendance*, to change the listed identification of the primary handicapping condition.

V. Is the currently identified Handicapping Condition and the current IEP incorrect because they changed the Primary Handicapping Condition from Speech/Language to Significant Identifiable Emotional Disorder (SIED)?

The staffing committee, including those professionals in the School

District who were directly familiar with the child, convened on June 1, 1992, for the partial purpose of reviewing The Children's Hospital's multi-disciplinary assessment reports on the child. The parents had sought an independent educational evaluation at The Children's Hospital and had made available the written reports of that evaluation for the staffing committee to consider. When a parent obtains an independent educational evaluation, the results of that evaluation must be considered by the School District in any decision made with respect to the provision of a free appropriate public education to the child. See 34 C.F.R. § 300.503.

The Children's Hospital psychological evaluation states that the child presents diminished self-esteem and several symptoms associated with depression; that she described herself as "ugly"; that she showed disturbed body image; that her depressive symptoms include difficulty with sleep, irritability, and preoccupation with morbid thoughts; that she acknowledged suicidal ideation; and that she seems isolated from her peers. Respondent's Exhibit R. That report expressly recognized that emotional factors were directly related to the child's poor school performance. Id. at 5. The psychological evaluation concluded that the child meets DSM-III-R Criteria for Major Depression.

The medical evaluation from The Children's Hospital acknowledges that the psychologist who had assessed the child was concerned about "very significant depression and an extremely poor self-image." Respondent's Exhibit T at 2. More intensive counseling services by the school psychologist were recommended. Id.

In addition to these reports having been discussed at length at the staffing meeting, testimonial evidence showed that the child's regular classroom teacher and others of the professionals who worked directly with the child reported that the child was presenting high distractibility, attention-getting behaviors, and pronounced fluctuations in her performance abilities that could not be attributable to her specific speech/language disability previously identified.

After a full and lengthy discussion, the professional team unanimously agreed that the primary handicapping condition believed to be interfering at that time with the Student's ability to learn was SIED. At least two members of the staffing team, Dr. Robert Fanning, District Director of Exceptional Student Services who chaired the meeting, and Michael Herzoff, the school psychologist who had previously assessed and provided counseling services to the child, were knowledgeable about and applied the specific criteria and qualifiers set forth in Colorado law for determining whether a student should be identified as SIED. See 1 C.C.R. 301-8 § 2.02(5)(b).

All professional members of the staffing team stated their conviction that, in listing on the IEP form that SIED was the handicapping condition, their intent was to indicate what they considered at that time to be the primary handicap interfering with the child's ability to learn. Nevertheless, all agreed that it was likely the child continued to have a speech/language handicapping condition, as had been the case since the child was initially identified as handicapped in 1990. Accordingly, goals, objectives, and a delineation of characteristics of service addressing the speech/language area continued to be indicated on the June 1, 1992, IEP.

All evidence points to the thoughtful determination made by the staffing team, fully supported by the documentary evidence, that resulted in the determination to identify the primary handicapping condition as SIED. No evidence was introduced to suggest that this determination was made in an improper manner or not based upon sufficient and valid information. Accordingly, there is no basis for altering the finding.

It is understandable that the parents were upset when the staffing team came to the conclusion that the handicapping condition should be changed from

Speech/Language to Significant Identifiable Emotional Disorder after two years. However, it must be remembered that these parents asked for the independent evaluation upon which this change of handicapping condition was based and that the members of the staffing committee all testified that other facts were taken into consideration in arriving at this decision.

It should be further noted that these evaluations at Children's Hospital were made by experts, and the Independent Hearing Officer feels that they should be given additional weight. This is so even though none of these experts appeared for oral testimony. The law is clear that such experts' (their reports were submitted as exhibits by both sides) written opinions must be considered even though they were not present for cross-examination.

Further, the Petitioners submitted not one scintilla of evidence to show that the opinions of the experts were wrong or that the decisions of the Staffing Committee as to the change of primary handicapping condition or the IEP were incorrect.

The Tenth Circuit Court of Appeals, in the case of Johnson v. Independent School Dist. No. 4, 921 F.2d 1022 (10th Cir. 1990), cert. denied, 111 S. Ct. 1685 (1991) has unequivocally stated that the burden of proof rests with the party attacking an IEP. Id at 1026.

In explaining its determination concerning the burden of proof, the Tenth Circuit Court cited the following language from the case of Alamo Heights Indep. School Dist. v. State B'd of Educ., 790 F.2d 1153 (5th Cir. 1986):

> [The Individuals with Disabilities Education Act] "placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents." In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, . . . the Act creates a "presumption in favor of the education placement established by [a child's individualized education plan]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [individualized education plan] is not appropriate."

Id. at 1158 (quoting *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *afff'd*, 468 U.S. (1984) footnotes omitted). Accordingly, because all issues identified by the Petitiorers in this due process matter constitute attacks on the child's IEPs, the Petitioners carry the burden.

VI. What is the present status of the child's IEP?

The evidence demonstrates that at least two features of the June 1, 1992, IEP are not at this time complete. Specifically, the placement plan found on page 3 of the IEP form, *see* Respondent's Exhibit X, which adds to the statement of the characteristics of service the date of initiation of those services as well as their anticipated duration, remains blank. Additionally, although one objective has been listed for each of the measurable goals, *see id.* at 2, full goals and objective pages have not been completed for two of the three listed goals.

The testimonial evidence presented at the due process hearing demonstrated that the June 1, 1992, staffing, although of several hours' duration, was ended abruptly when the parents decided to leave prior to the completion of the IEP form. Dr. Fanning stated in his testimony that, as chair of the meeting, he expressed the intent for the committee to reconvene t an appropriate time prior to the start of the 1992-93 school year in order to finish those aspects which were not then complete.

Two events transpired during the summer of 1992 that prevented the team from reconvening. On August 17, 1992, the parents formally notified the School District that they were requesting a due process hearing. *See* Respondent's Exhibit Z. The testimonial evidence showed that the parents had indicated before leaving the June 1, 1992, staffing that such a due process request would be lodged.

Secondly, the parents transferred the child from Kendrick Lakes Elementary School, the school at which the child had previously been receiving her services, and enrolled her at Green Mountain Elementary School. The parents took this action, although informed by the principal at Green Mountain on several occasions orally and in writing on August 26, 1992, see Respondent's Exhibit AA, that, pursuant to the authority vested by the Board of Education in him when determining whether to accept transfer students to his school, he had concluded that the special education caseload at Green Mountain was so great that he must refuse any transfer requests for children who needed special education services. Accordingly, the parents effected the child's transfer knowing that the child would not be receiving special education services if placed at Green Mountain.

Pursuant to the IDEA, during the pendency of a due process proceeding, the child who is the subject of that proceeding is to remain in the then-current educational placement, unless a school district and parents agree to have the child placed in some other situation during the pendency of the proceeding. See 20 U.S.C. § 1415(e)(3). Dr. Fanning testified that due to (1) the incomplete status of the IEP constructed on June 1, 1992, (2) the parents' known displeasure with the program in which the child had been receiving services at Kendrick Lakes, (3) the extant nature of the parents' formal withdrawal for consent for a portion of the child's special education services, see Respondent's Exhibit M, (4) the pendency of the due process proceeding, and (5) the parents' knowledge that the child had been allowed to transfer to Green Mountain with the express understanding that special education services would not be provided to the child as a transfer to that school, he determined it appropriate to consider the child's current enrollment at Green Mountain as the agreed upon interim placement pending the due process proceeding. See EHLR 352:222, :225 (OCR 1986) (school district found not to be in violation where the failure to implement the IEP resulted from parents failure to give consent to that placement).

It would appear that since the last staffing occurred on June 1, 1992, some five months ago, and since no evidence has been submitted as to the child's current progress in a regular classroom, that a new staffing should take place as soon as possible.

It further appears that prior to this staffing, a follow-up independent evaluation should take place. This evaluator or evaluators should have the benefit of conferring with the child's present teacher(s) and principal prior to making his or her report(s).

The child should be able to continue her Special Education at Green Mountain Elementary School if appropriate.

ORDER

1. The child has not been denied a free appropriate public education by the School District.

2. The goals and objectives in the child's IEPs are appropriate and the IEPs have been fully implemented prior to June 1, 1992.

3. The child has been educated in the least restrictive environment.

4. The School District provided the proper prior notice of the staffing meeting which occurred on June 1, 1992, and at which time a determination was made to change the child's identified primary handicapping condition.

5. The identification of the handicapping condition was a decision the professional team was empowered to make. The team's specific determination on June 1, 1992, was unquestionably based upon sufficient, supporting evidence.

6. The School District is not in violation of any pertinent federal or state laws and regulations.

7. The School District shall provide the child with an independent evaluation either by the prior evaluators at Children's Hospital, or other experts, as soon as possible.

8. The parents shall give these evaluators permission to contact personnel at Green Mountain Grade School.

9. Upon submission of the report(s) of these evaluators, the School District shall convene a staffing committee chaired by Dr. Bob Fanning and consisting of personnel at Green Mountain Elementary School, including but not confined to the principal, the child's teacher, the special education teacher, the psychologist, and itinerant special education experts serving this school.

10. The School District shall provide the child with transportation effective on the date of this Order.

Dated in Denver, Colorado, this 2nd day of November, 1991.

Richard G. Fisher

Richard G. Fisher
Independent Hearing Officer
3686 South Forest Way
Denver, Colorado 80237-1015
(303) 756-4417

Case Number: 92:505

Status: Complaint Findings

Key Topics:
Student Evaluation
Procedural Safeguards (notice, timeliness of staffing)
Free Appropriate Public Education (FAPE)
Least Restrictive Environment

Issues:

- Whether or not the District violated the Individuals with Disabilities Education Act (IDEA) by failing to assess child in a timely manner.
- Whether or not the District violated the IDEA by failing to schedule a staffing meeting at a mutually convenient time, in a timely manner, and with appropriate notice to parents.
- Whether or not the District failed to provide FAPE by not providing special equipment and by not considering all possible placements.

Decision:

- The District was not in violation of the IDEA regarding the assessment, staffing and provision of FAPE for this child.

Discussion:

- Required timelines for assessment and staffing were met.
- Notification requirements regarding meetings were met.
- Placement options were considered at meetings.
- Availability of appropriate public placement made consideration of private placement unnecessary in this instance.
- Need to determine subsequent year's placement.

FEDERAL COMPLAINT NUMBER 92:505

FINDINGS AND RECOMMENDATIONS

Preliminary Matters

1. The complaint was received by the Federal Complaints Coordinator, Office of the Deputy Commissioner, Colorado Department of Education (CDE) on May 13, 1992. The process for receipt, investigation and resolution of a complaint to CDE is governed by the Education Department General Administrative Regulations, Complaint Procedures of the States, 34 C.F.R. 76.780 et seq. and Colorado State Board of Education Policy No. 1280.0. The regulations and policy were established pursuant to the requirements of the General Education Provisions Act, 20 U.S.C. 1221e et seq.

2. The complaint was filed by Mr. R.F.G. on behalf of his daughter, S.L.G. The complaint named as the respondent Dr. Daniel P. Johnson, Superintendent, Clear Creek School District No Re-1 (the "district").

3. It is undisputed that the district receives funds under the Individuals With Disabilities Education Act, 20 U.S.C. 1401 et seq. (the Act) specifically to provide special education and related services to students within its jurisdiction who are eligible as children with disabilities under the Act.

4. It is undisputed that S.L.G. is a 17 year old student with disabilities as defined in the Act.

5. The complaint was accepted in part for investigation based upon a determination that CDE has jurisdiction over some of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE. Several of the issues raised in the complaint concerned matters over which CDE has no jurisdiction or concerned regulations administered by other agencies and the complainant was so advised when receipt of the complaint was acknowledged.

6. The sixty day time line allowed by 34 C.F.R. 76.781(a) within which to investigate and resolve this matter expires on July 13, 1992.

7. The investigation of the complaint included:
   a. a review of the documents submitted by the parties;
   b. research of relevant law and special education resources; and
   c. discussion with the complainant, the Director of Special Education for the district, the attorney for the district, and CDE staff who have been contacted by the complainant.

Statement of the Issues

1. Whether or not the district violated the Act by failing to assess the child in a timely manner.

2. Whether or not the district violated the Act by failing to schedule a staffing/IEP meeting at a mutually convenient time, in a timely manner, and with appropriate notice to the parent.

3. Whether or not the district violated the Act by failing to provide the student with a free appropriate public education specifically by:

   a. failing to provide a special tape recorder and tapes as allegedly required by the student, and

   b. failing to consider all possible appropriate educational placements for the student.

Relevant Statutory and Regulatory Citations

20 U.S.C. 1401, et seq. including 1412, 1413, 1414, and 1415.

34 C.F.R. 300.2, 300.5, 300.11, 300.13, 300.14, 300.128, 300.133, 300.235, 300.300, 300.340-48, and 300.530-532.

Fiscal Year 1992-94 State Plan Under Part B of the Individuals With Disabilities Education Act as Amended by Public Law 94-142, Part V.

Findings

1. On November 12, 1991 the complainant requested that the district conduct an assessment of his daughter, S.L.G. Written permission to assess was provided by him with the stipulation that the district inform him of each test before it is given so he could review that particular test and give consent.

2. On December 7, 1991, the District provided written notification to complainant of a potential staffing/IEP meeting , but requested that he facilitate the release of confidential information from psychiatric or psychological assessments previously administered by the student's physician so that the student would not need to undergo repetitive assessments by school district personnel. Assessments in those areas were necessary in order to have a complete evaluation of the student's educational needs available for the staffing/IEP team's consideration.

3. On December 12, 1991, the district provided written notification to complainant of the inability to hold a staffing/IEP as planned due to the need for psychiatric and psychological records or evaluation results. The letter requested permission to conduct assessments regarding S.L.G.'s eligibility for special education services, since R.F.G. had not facilitated the release of requested records. Subsequently, complainant allowed the district psychologist to see some prior records and to conduct some assessment.

4. On January 16, 1992, the district provided written notification to R.F.G. that a staffing/IEP meeting was scheduled on January 29, 1992 and that a social history and psychological exam would be completed by that time. The district indicated it would utilize the academic evaluation provided by Centennial Peaks Hospital. The letter also states, "If for some reason, you have to change the date or time of the staffing, please let me know.

5. The district did perform the assessments for which consent was given.

6. In a letter dated January 24, 1992, R.F.G. requested that the time of the staffing/IEP meeting be changed. The district agreed to this request.

7. The district conducted a staffing and prepared an Individualized Education Program ("IEP") for S.L.G. on January 29, 1992. The complainant, the mother, the student, attorneys for the complainant and the district, and district personnel were in attendance at the meeting.

The student's needs and characteristics of service were identified. The staffing/IEP team then considered what would be an appropriate educational placement for the student in the least restrictive environment. By conference call, the team was made aware of the student's physician's opinion that she should be placed in a day treatment center.

The staffing/IEP team considered several appropriate educational placements in the district. The staffing/IEP team consensus was to recommend placement in regular education with special education resource center assistance, one-half day in school programming, and supervised independent study. This was agreed to by the team including the complainant and his attorney. During the investigation, the Director of Special Education for the district indicated that it is the district's policy to explore in-district placement alternatives prior to recommending out-of-district placement.

8. The complainant provided written permission for initial placement in a special educational program as outlined on the IEP.

9. Services were provided and review staffing/IEP meetings were held on 2/18, 3/4, 3/17, 4/7, 5/5, 5/19 and 6/2 at mutually agreed upon times. Each meeting was utilized to review progress and suggest alternative strategies.

a. At the 3/4/92 meeting, complainant suggested the acquisition and use of a machine which reads textbooks. The district indicated it would order that machine. A purchase order for a Books for the Blind Recorder was prepared on 3/6/92 and authorized on 4/9/92.

b. On 3/17/92, the district indicated that a reading machine and tape decks had been ordered and tapes were coming. According to R.F.G. they did arrive.

c. On 5/5/92, adolescent day treatment was discussed as a placement option apparently due to a relapse in S.L.G.'s condition and medical changes, although no medical evidence was made a part of the meeting record. It is unclear whether it was the consensus of an appropriately constituted staffing/IEP team that the child's educational placement be changed to a day treatment center. There was no consideration of the student's evaluation results so that a change of placement could be considered and it does not appear that a person qualified to interpret any evaluations was present. Several out-of-district placements were reviewed including Savio House, Colorado Christian Home, Chicago Creek and Centennial Peaks.

d. The district agreed to provide a written statement of its financial responsibility regarding out-of-district placement and to provide a list of alternative placements for the parents to observe. However, it is not clear whether this was done because the parents wished to consider a private unilateral placement because of the student's medical needs and the district would agree to pay its per pupil operating revenue for the student's educational program or because the staffing/IEP team consensus was that a day treatment program was the appropriate educational placement in the least restrictive environment for the student.

e. Notes from the review staffing/IEP meetings dated 5/19/92 indicate that all parties agreed that the district would provide homebound services from 5/20/92 to 6/5/92 and summer school from 6/9/92 to 7/2/92. Placement into a day treatment program was said to have needed further investigation. S.L.G. received homebound services and attends summer school.

Discussion

1. (34 CFR 300.531: "Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted...") (92-94 State Plan, page 13: Each administrative unit shall....assure that each youth is assessed and staffed within 60 school days of the special education referral")

The Act, implementing regulations and the State Plan require that assessment and staffing/IEP be completed within 60 school days from the date of referral. Assessment and the staffing/IEP meeting were completed within 44 school days from the date of referral.

2. (34 CFR 300.345 (a-b): "Each public agency shall take steps to insure that one or both of the parents ...are present .... or are afforded the opportunity to participate, including: notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and scheduling the meeting at a mutually agreed on time and place.") "(92-94 State Plan, page 15: "The unit shall...notify parents and other required participants in writing and in a timely manner of the staffing.")

The Act, implementing regulations and the State Plan require that staffing/IEP meetings be scheduled at a mutually convenient time, in a timely manner and with appropriate written notification to the parents. Written notification must include the opportunity to reschedule the meeting if the time and place set forth is not mutually convenient. The district adjusted the staffing/IEP dates to accommodate the parental time needed to provide for psychiatric and psychological records or evaluations. The staffing/IEP meeting was held 44 school days from the date of referral. Written notification of the initial staffing/IEP meeting was provided to complainant thirteen days prior to the meeting. The district adjusted the time of the scheduled staffing/IEP meeting to accommodate parental request.

3. (34 CFR 300.551: "Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services. The continuum required ...most include the alternative placements listed in the definition of special education (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.") (92-94 State Plan, page 16: "The staffing team shall consider all possible alternative placements where the services may be provided. The staffing team shall recommend placement in the least restrictive environment which most accurately reflects the needs of the student and gives appropriate consideration to the desires of the parents.")

The Act, implementing regulations and the State Plan require that services be provided in accordance with the IEP and that alternative educational placements be considered. Although there was a month's delay in processing the purchase order for a recorder, it was purchased and tapes were made available. Although no out-of-district placements were considered at the initial staffing/IEP meeting, there is evidence that (1) the staffing/IEP team did agree that an appropriate educational placement could be provided in the district, (2) the parents did approve placement in accordance with the initial IEP and (3) that a variety of placement options have been considered during the numerous review meetings between the parents and the District. Homebound services and summer school were provided as alternative placements as a result of review staffing/IEP meetings since all of the parties were in agreement even though no reevaluation occurred prior to the change in placement.

Further, federal law does not require that in every instance school districts consider the appropriateness of education services offered by private schools when the staffing/IEP team concludes that an appropriate program is offered in the public school system. The remaining issue appears to be the recommended placement for the 1992-93 school year.

Conclusion

1. The district did not violate the Act, its implementing regulations or the State Plan by:

   a. failing to assess the child in a timely manner,

   b. failing to schedule a staffing/IEP meeting at a mutually convenient time, in a timely manner, and with appropriate notice to the parent, and

   c. failing to provide the student with a free appropriate public education specifically by:

      (1) failing to provide a special tape recorder and tapes or by

      (2) failing to consider all possible appropriate educational placements.

2. It is generally inappropriate for CDE to substitute its opinion for that of a staffing/IEP team as to what constitutes an appropriate educational placement for a student unless all to the evidence points to a clear error on the part of the team. It is certainly inappropriate in this case, where the complainant was initially in agreement with the placement and now asks CDE to order a change based on certain information he has declined to provide CDE and which purportedly supports his position. The complaint process is not a hearing where testimony is provided and witnesses are subject to cross examination. The process depends heavily on document reviews when the oral statements of the parties conflict. Consequently,

the remedies available are necessarily driven by the information provided and relied upon to resolve the issues in the complaint.

It may very well be that the appropriate educational placement for this student is a private day treatment center or it may be a resource room in a public school, but the record does not make it clear at this time. Further, a change in educational placement may not occur without updated evaluation information and a staffing/IEP meeting.

Recommendations

1. While technically the district did not fail to comply with any applicable requirement, the district appears to have an unwritten policy to try all alternatives within the district prior to exploring or considering out-of-district placements. This policy is legitimate in a situation where the district has available appropriate educational placements in the least restrictive environment for a student. It would not be a valid policy where no appropriate educational placement exists in the district.

2. Given all the options explored, the recommended placement for the 1992-93 school year is not yet clear. The district is ordered to take all necessary steps to secure updated assessment information to enable a staffing/IEP team to make a recommendation regarding the student's needs, and characteristics of service, to reconvene the IEP meeting, to discuss alternative educational placements and determine an appropriate educational placement in the least restrictive environment which meets all the needs identified in the IEP of S.L.G. If both parties agree, CDE will provide an experienced neutral staff member to facilitate the IEP meeting. The staffing/IEP shall be completed by 9/1/92 and the district is to send to the undersigned by 9/4/92, a copy of the staffing/IEP documents reflecting the educational placement decision.

3. If the complainant does not agree with the decision of the IEP meeting, he may avail himself of the variety of procedural safeguards afforded to him by law and regulation and of which he has been informed by the district.

Dated this ___ day of June 1992.

Cheryl M. Karstaedt
Federal Complaints Coordinator

Case Number: 92:506

Status: Complaint Findings

Key Topics: Extended School Year (ESY)
Related Services

Issues:

- Whether or not the District had an ESY policy that met appropriate legal standards and whether or not the policy was applied in an individual manner to potentially eligible students.
- Whether or not the District provided recreation as a related service to those students who required such in order to benefit from their educational programs.

Decision:

- The District's policy on ESY services did not comply with the law and eligibility determinations were not appropriately made and recorded.
- The District failed to appropriately consider recreation as a potential related service.

Discussion:

- Legal standard for ESY eligibility and requirements of individual consideration for participation in ESY programs.
- Recreation as a potential related service and recreation as an extracurricular activity.

FEDERAL COMPLAINT NUMBER 92:506
FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

1. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on August 24, 1992.

2. The complaint was brought by R. K. against El Paso County School District #11 (the district), on behalf of his daughter and all other similarly situated students.

3. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state complaint procedures, 34 C.F.R. 300.660-300.662 and Colorado State Board of Education Policy No. 1280.0.

4. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate education to eligible students with disabilities under the Act.

5. The complaint was accepted, in part, for investigation based upon a determination that CDE had jurisdiction over several of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

6. The timeline within which to investigate and resolve this matter was to expire on October 23, 1992. Because of the complexity of the issues being investigated and the volume of information sought from the district, the district requested and was granted an extension of time within which to respond to the complaint. The timeline for resolution was then extended until December 1, 1992 in order to thoroughly consider all of the information presented by both parties.

7. The investigation of the complaint included a review of the documents submitted by the parties, an on-site visit to the district, a review of numerous files of students with disabilities served by the district, discussions with numerous persons having information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

II. ISSUE NO. 1

A. STATEMENT OF THE ISSUE

The first issue investigated was whether or not the district has violated the provisions of the Act, by failing to provide students with disabilities within its jurisdiction a free appropriate public education, including extended school year services, as alleged by the following:

1. Each student receiving extended school year (ESY) services is receiving the same amount and duration of services as every other student and the amount and duration of ESY services are not being determined on an individual basis;
2. The district arbitrarily denies ESY services to students with disabilities who do not spend more than 50 percent of their school day in special education classes and therefore, fails to make eligibility determinations for ESY services on an individual basis; and
3. Students who met eligibility criteria for ESY services were not provided those services but, instead, were referred to JTPA programs.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (18) and (20) and 1414.

34 C.F.R. 300. 2, 300.8, 300.14, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, and 300.342 - 300.346.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act,(State Plan), Section V. E., Appendix-Extended School Year Guidelines.

C. FINDINGS

1. At all times relevant to the complaint the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district was that, in accordance with the Act, it would provide a free appropriate public education, including special education and related services, to each student with disabilities within its jurisdiction to meet the unique needs of that child.

4. The district's current ESY Policy is reflected in an Office Memorandum from Ron Hage, the Director of Special Education, dated March 18, 1992 and a paragraph in the district's Special Education Manual, page 55.

5. The ESY policy does not correctly state the legal standard for a student's eligibility to receive ESY services.

6. As stated by the Tenth Circuit Court of Appeals in Johnson v. Indep. Sch. Dist. No. 4 of Bixby, Tulsa Co., Oklahoma, 921 F.2d. 1022, 1028 (10th Cir. 1990), cert. denied, 111 S.Ct. 1685 (1991) and subsequently by the United States District Court for the District of Colorado in ACL et. al. v. Romer, et. al. (91-Z-776, Order 3/5/92),on appeal to the Tenth Circuit, the applicable legal standard to use in determining a student's eligibility for ESY services is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if the student is not provided with an educational program during the summer months.

7. The recognition that certain students with disabilities might require services beyond a traditionally established academic year was set forth in the seminal case of Armstrong v. Kline 476 F.Supp. 583 (E.D. Pa. 1979), modified and remanded sub nom. Battle v. Commonwealth, 629 F.2d. 269 (3rd Cir. 1980), on remand, 513 F.Supp. 425 E.D. Pa. 1980) cert. denied sub nom., Scanlon v. Battle, 101 S.Ct. 3123 (1981).While the court in Armstrong was addressing the needs of a particular group of students, its holding has been generally applied to all students with disabilities. The court found that a student with disabilities under the Act is entitled to an educational program in excess of the traditional academic year if regression caused by

interruption in educational programming, together with the student's limited recoupment capacity, would significantly jeopardize the benefits accrued to the student during the school year. See also Alamo Heights Independent School District v. Board of Education, 790 F.2d. 1153 (5th Cir. 1986) and Crawford v. Pittman, 708 F.2d.1028 (5th Cir. 1983). These cases were used to arrive at the standard set forth above as enunciated by the federal courts in Colorado and applicable to the school districts in the state.

8. The district's policy correctly states that the purpose of an ESY program is to maintain and preserve skills learned and educational benefits accrued during the school year. However, irretrievable loss as stated in the district policy is not the correct standard to use in making an eligibility determination.

9. Additionally, the district's policy fails to provide for an individual determination of the frequency and duration of ESY services to be provided to an eligible student.

10. The policy states that the hours for ESY services are from 9:00 a.m. - noon and the services are offered Monday through Friday. The program was offered from June 22 to July 31. The district provided documentation on, basically, three variations of an ESY program in terms of frequency and duration. However, there is no place on the ESY referral form to designate for each student an IEP team's determination of the duration of the program needed by an individual student based on that student's unique needs. The cases cited above make clear that once it has been determined that a child is eligible for ESY services, the IEP team must determine on an individual basis that reflects the unique needs of each child, the duration of the program in terms of the number of hours per day, number of days per week, and number of weeks during the summer. This determination is to be reflected on a student's IEP. There was no documentation provided by the district to suggest that a determination as to the duration of services was made on an individual basis and included on students' IEPs.

11. The following information is part of the special education records of A.K., as determined by a thorough onsite review of her records, both at

the central special education offices and at East Jr. High School:

a. The annual review dated 11/6/90 stated the following needs applicable to ESY: "maintain waiting behavior...", "maintain grooming and self help...", and "extended school year". No reference to extended school year was found in a review of goals, characteristics of service, instructional services or related services.

b. The annual review dated 11/14/91 stated the following needs: "extended school year" and "maintain grooming of self". No reference to extended school year was found in a review of goals, characteristics of service, instructional services or related services.

12. A district representative indicated to the complaints investigator that individualized ESY plans could be found in the individual students" school files rather than in the central special education files. Therefore the complaints investigator visited A. K.'s school, reviewed files and interviewed a school administrator and a special education teacher. No records were found relating to the determination of ESY services. The special education teacher indicated that the need for ESY is determined by the individual educational planning committee. This need is simply stated, "needs extended school year". The student's primary special education teacher then prepares enrollment materials and facilitates the provision of ESY services within the parameters set by the Director of Special Education in a yearly ESY memo. The memo indicates the number of weeks, days per week and hours per day that ESY is to be offered. Determination of the duration of ESY services is not made on an individual basis. It is also noted that the type of ESY services is not made by an IEP team on an individual basis.

13. Interviews and review of student records corroborate that the district's implementation of the policy is not within correct legal parameters.

14. While it may have been true in past school years, the current ESY policy does not make it a condition of eligibility for ESY services that

a student have participated in special education services for over 50% of their school year time.

15. The district provided the names of eighty students who received JTPA services during the past year. A random sample of these records were reviewed in depth to determine if eligibility criteria for ESY services had been met and/or stated and if JTPA referral was subsequently made. Reasons for JTPA referral in most cases were "to earn credits" and "to be assisted in seeking summer employment". Additional records were reviewed to see if ESY were listed as a need, goal or service and none of these records indicated such. No records reviewed indicated JTPA referrals for ESY eligible students.

III. ISSUE NO. 2

A. STATEMENT OF THE ISSUE

The second issue investigated was whether or not the district violated the Act by failing to provide students with disabilities within its jurisdiction a free appropriate public education, including recreation as a related service, as alleged by the following:

1. Students with disabilities who require recreation as a related service to assist them to receive reasonable benefit from their educational programs as determined by their IEP teams are not receiving such services; and

2. The district has a policy of not providing recreation as a related service, regardless of need, on the Individualized Education Program of any student with disabilities, unless ordered by a hearing officer to do so.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16) (17) (18) and (20), and 1414.

34 C.F.R. 300.2, 300.8, 300.11, 300.16, 300.17, 300.121, 300.130, 300.235, 300.300, and 300.342 - 300.346.

State Plan, Section V.E.

C. FINDINGS

1. Pursuant to the Act, students with disabilities who are unable to receive reasonable benefit from regular education are entitled to special education and related services tailored to meet their individual needs and designed to provide them with reasonable benefit from their education program.

2. The related services to which a student with disabilities is entitled are those required to assist the child to benefit from special education.

3. Among the specifically recognized related services under the Act are recreation services. They are defined in the regulations as follows:
   (i) Assessment of leisure function;
   (ii) Therapeutic recreation services;
   (iii) Recreation programs in schools and community agencies; and
   (iv) Leisure education.
   20 U.S.C. 1401(17), and 34 C.F.R. 300.16(9).

4. A student with disabilities is entitled to recreation services, as defined, if, in the opinion of the IEP team developing the IEP for the student, recreation services are required to assist the student to benefit from special education.

5. It is alleged that the district does not provide recreation services as a related service for those students whose IEP teams identify recreation as required by the student to benefit from education. However, there is no evidence to suggest this is correct.

6. On the other hand, the district asserts that it provides recreation as a related service to 25 students. A list of 22 of these students plus two additional names were provided to the complaints investigator for record review. An onsite record review indicated the following:

   a. Six of the records could not be reviewed as they were not on file.

b. Seven of the remaining eighteen records mentioned recreation services or leisure education, however none of these records listed recreation as a related service. No records indicated that recreation or leisure services were to be provided by the district to meet specified needs, goals or short term objectives and none indicated whose responsibility it was to provide the services.

(1) Needs included "exercise in adequate amounts" and "a sustained exercise program before graduation".

(2) Goals included "will participate in at least one social activity a week", "will talk on the Phone", "participate in CBCA activities" and "increase awareness of recreation/leisure opportunities and social opportunities".

(3) Short term objectives included "will pursue Nordic Track at home", "will continue Special Olympics", "will look into flying lessons"j, "Dad will check on summer bowling", "continue to pursue leisure time activities", "credits can be earned through bowling league", "participate in one home bound recreation/leisure activity two times per week", and "participate 2-3 times per week in prescribed exercise program at school".

7. At least one staff person who works with A. K. indicated that it would be appropriate to discuss recreation as a need and related service, but this was not discussed at the most recent annual review on 10/9/92. Mr. K. was reported to have called the school district three days after the review asking for Special Olympics to be added to the IEP, but was correctly advised that this could not be added without bringing together the IEP committee.

8. In support of its position, the district provided much information on the various sporting and recreational opportunities provided by the district for its students with disabilities. Indeed, the activities are numerous, coordinated and transportation is provided. However, the district appears to be confusing its legal obligation in regard to extracurricular activities with its legal obligation regarding recreation as a related service.

a. Pursuant to the Act and its implementing regulations, a district's obligation regarding extracurricular activities is stated as follows:

> Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities and equal opportunity for participation in those services and activities.
> 34 C.F.R. 300.306.

b. Pursuant to the Act and its implementing regulations a district's obligation regarding recreation as a related service is stated as follows: Free appropriate public education means special education and related services....Related services means...services as are required to assist a child with a disability to benefit from special education, and includes....recreation...Recreation includes assessment of leisure function; therapeutic recreation services and recreation programs in schools and community agencies, and leisure education.
34 C.F.R. 300.8, 300.16.

9. Additionally, there is evidence to suggest that IEP team members are not clear as to the distinction between recreation as a related service and extracurricular recreation activities.

IV. CONCLUSIONS

1. The district's policy and procedure do not comply with the Act's requirements regarding the provision of a free appropriate public education, including ESY services, to students with disabilities within the district's jurisdiction.

2. The district does not make appropriate eligibility determinations for providing ESY services to students. A determination of eligibility based on legal criteria is not recorded on the IEP.

3. The IEP teams do not determine nor appropriately document on the IEP forms the goals, short term objectives and specific service students are to receive during the ESY program.

4. While several options exist, students receiving ESY services are offered programs of the same length, frequency, and duration based on category of disability regardless of a student's individual needs, in violation of the Act.

5. The district does not arbitrarily deny students' participation in ESY programs based on the amount of time they spend in special education during the school year.

6. The district did not refer students for participation in JTPA programs as a substitute for the district providing ESY services to ESY eligible students

7. The district failed to appropriately consider recreation as an available related service for any student who might require it to benefit from special education.

V. REMEDIAL ACTIONS

1. On or before February 1, 1993, the district will submit to CDE a policy and procedure that complies with the legal standard for providing students with disabilities ESY services.

2. On or before March 1, 1993, the district will modify its ESY referral form to include an area for documentation of an individual student's eligibility for ESY services, as well as an area to document the individualized determination of the type, length, frequency and duration of the student's ESY program. Such revised form will be submitted to CDE on or before said date.

3. After March 1, 1993, or such subsequent date when CDE accepts the new policy and referral form as complying with the law, all IEP meetings shall be held utilizing the new ESY policy, procedures and referral form.

4. Prior to June 1, 1993, reviews shall be held for all students whose current IEP indicates a need for ESY to correctly determine eligibility and duration of services.

5. On or before June 1, 1993, CDE will arrange with the district to survey a sample of the IEP files for those student's eligible to receive ESY services during the summer of 1993 to insure that appropriate individual determinations were made regarding the provision of ESY services.

6. On or before February 1, 1993, the district will distribute a memorandum to staff members involved in IEP team decisions that clarifies the role of recreation services as a potential related service (as distinguished from extra curricular activities)for students with disabilities who require such services to benefit from education and will provide a copy of said memorandum to CDE.

7. On or before January 15, 1993, a review of A.K.'s IEP shall be held to determine the need for recreation as a related service as distinguished from extra curricular activities.

Dated this 30th day of November, 1992

Cheryl M. Karstaedt, Federal Complaints Coordinator

Case Number: 92:508

Status: Complaint Findings

Key Topics: Individual Education Plan (IEP)
Free Appropriate Public Education (FAPE)
Related Services

Issues:

- Whether or not the District violated the law by failing to provide services designated on the IEPs of two students.
- Whether or not the District failed to provide social work services and homebound instruction to students who needed these services.

Decision:

- Students who needed social work services were provided them.
- No evidence was provided to support the allegation that certain groups of students received inappropriate homebound services.
- The District failed to provide the services called for on the students' IEPs.

Discussion:

- Contents of IEPs
- Social work as a related service.

FEDERAL COMPLAINT NUMBER 92:508

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

1. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (CDE), on October 15, 1992.

2. The complaint was brought by R.A. against El Paso County School District #11 (the district), on behalf of her son, another student whom she represents and all other similarly situated students.

3. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., (the Act), and its implementing regulations concerning state complaint procedures, 34 C.F.R. 300.660-300.662 and Colorado State Board of Education Policy No. 1280.0.

4. The complaint was brought against the district as a recipient of federal funds under the Act. It is undisputed that the district is a program participant and receives federal funds for the purpose of providing a free appropriate education to eligible students with disabilities under the Act.

5. The complaint was accepted, in part, for investigation based upon a determination that CDE had jurisdiction over several of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

6. The timeline within which to investigate and resolve this matter was extended from December 15 to December 22 1992 because of the additional information submitted by complainant for consideration by CDE shortly before the findings were to be issued.

7. The investigation of the complaint included a review of the documents submitted by the parties, an onsite visit to the district, discussions with numerous persons having information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

II. ISSUE NO. 1

A. STATEMENT OF THE ISSUE

The first issue investigated was whether or not the district has violated the provisions of the Act, by failing to provide certain students with disabilities within its jurisdiction a free appropriate public education as alleged by the following:

1. Services stated on particular students' IEPs, specifically an aide to assist R. M. with his wheelchair and toileting, transportation for R. M., adaptive physical education for R. M. and J. A. and a job coach for J. A. are not being provided;

2. The district arbitrarily and unilaterally changed the amount of services provided pursuant to the IEP for J. A. by reducing teacher aide services and adaptive physical education services;

3. The district failed to provide supported integrated services for R. M. in Palmer High School where there are no aides, accommodations or supports and no training of regular educators.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (18) and (20) and 1414.

34 C.F.R. 300. 2, 300.4, 300.11, 300.14, 300.121, 300.130, 300.180, 300.235, 300.300, and 300.342 - 300.346.

Fiscal Years 1992-1994 State Plan Under Part B of the Individuals With Disabilities Education Act,(State Plan), Section V. E., X. B.

C. FINDINGS

1. At all times relevant to the complaint the district was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the district, in part, based on the assurances contained within the application.

3. One of the assurances made by the district was that, in accordance with the Act, it would provide a free appropriate public education, including special education and related services, to each student with disabilities within its jurisdiction to meet the unique needs of that child. In carrying out its responsibilities under the Act, the district identified J. A. and R. M. as students with disabilities and developed an IEP for each student.

4. A review of the IEPs of R. M. indicates the following:

   a. A triennial review dated 3/22/90 stated the need for "busing" and "Adaptive P.E.

   b. A review dated 3/12/91 indicated a need for "transportation" and transportation "to school"

   c. Post staffing notes dated 3/17/92 indicated "weaknesses: wheelchair-bound and uncontrollable body movements; needs: constant supervision and monitoring, supervision and assistance with eating and toileting, and services: Adaptive P. E.

   d. An addendum to the 3/22/90 staffing dated 9/30/92 indicated:

      (1)"concern about the elevator because cannot be utilized during fire drills...he needs to be carried down the stairs...when elevators are not functioning, he is stuck on the first unless he is carried"

      (2)"special school transportation", and

      (3)"7th period job training and Adaptive P.E...He will have adaptive P.E. currently for 15 min per day and no less than 30 min per week"

   e. A review dated 11/3/92 indicated the following:

      (1)Needs: "classroom assignments modified, modify methods of testing, computer program which is less distracting, additional assistance in classroom through peer tutoring, cooperative learning, grand-friends program, parent volunteers, etc."

(2)Goals: "demonstrate improved body control, independence and safety while transferring and while propelling wheel chair"

(3)Characteristics of Service: 'Adaptive P.E. - direct, group size 2 (no minutes/week listed), modifications of curriculum to include use of tape recorders... use of oral testing etc., alternative grading system"

5. A review of the IEPs of J. A. indicates the following:

   a. A triennial review dated 9/21/90 indicates the need for a "job coach", "Adaptive P.E." and "individual aide...for the fall semester...reevaluate the need for an aide..for the second semester....The above mentioned aide will also be responsible for the observation, monitoring and training for J. in street crossing, safety and mobility"

   b. An addendum to the 9/21/90 IEP dated 10/14/92 indicates:

      (1)"need a qualified job coach...It is felt that J. needs to be transitioned from school aide to community job coach...Until this happens, J. will continue to need job coach while enrolled at school."

      (2)"J. is currently receiving 15 min of Adaptive P.E. each day...This is not appropriate based on consensus of staffing team...It is felt that J.'s needs are not being met and time should be increased to a minimum of 3 55 min periods per week."

6. A schedule provided by J.'s mother indicates he is currently receiving Adaptive P.E. from 12:05 to 12:15 daily

7. On site interviews with several current service providers for J. A. and R. M. indicated:

a. Regarding an aide for R. M. : Although the IEP for R. M. indicates a need for supervision and assistance with eating, toileting, getting him to adaptive physical education and helping him to exit the building during a fire drill when the elevator cannot be utilized, it does not indicate service delivery to meet these needs. Interviews with staff provided the following relative information.

No aide is provided for R. M. Service providers indicated that they rely on regular education students to provide this assistance and the school gives credit for serving as an aide. Currently, however, students reportedly are not willing to do this. One service provider indicated that the IEP committee was told by a supervisor, "if you write in an aide, there is no money for it, so that is not an option".

b. Regarding a job coach for J. A.: The IEP for J. A. indicates the need for a job coach. Interviews with staff indicated that a job coach is provided all afternoon every day.

c. Regarding adaptive physical education (APE) for J. A. and R. M.: The IEP for R. M. indicates that APE is to be provided 15 minutes per day and no less than 30 minutes per week. The IEP for J. A. indicates that APE is to be provided a minimum of three 55 minute periods per week. Interviews with staff provided the following relative information.

Both students are provided 15 minutes of APE together, daily. However, due to the time needed to transition R. M.. it was stated that each student only gets about 7 minutes of APE per day. A number of service providers stated that although each needs a longer period of time, some APE is provided through bowling and skiing and the Community Based Intervention (CBI) program. There is nothing on the IEP, however, to indicate these services are to be provided to meet the adaptive physical education needs. J. A. is not getting three 55 minute periods of APE per week.

d. Regarding transportation for R. M. : The IEP for R. M. states that special school transportation is to be provided, but does not specify the circumstances under which this is to be provided. Interviews with staff provided the following relative information.

R. M. is provided transportation to and from school daily by means of a lift van. A number of service providers expressed concern regarding transportation for CBI activities. It was stated that "on 2-3 occasions this year, we left Ritchie out of an activity due to lack of transportation". CBI staff indicated that arranging for a lift van for these activities has not yet occurred due to lack of communication regarding procedures for requesting such, source of payment and time needed to acquire the van. Although one staff member attempted to utilize his private vehicle to transport R. M., he stated that he no longer is comfortable doing so due to the parent's concern about damage to the wheel chair. CBI activities are therefore limited to those which can be easily accessed by city bus.

e. Regarding supported integrated services for R. M.: The IEP for R. M. indicates the need for classroom assignments and methods of testing to be modified, peer tutoring, cooperative learning grand-friends, use of tape recorders, oral testing and an alternative grading system. Interviews with staff provided the following information.

All staff indicated that a wide range and number of supports, accommodations and modifications are provided for R. M. This includes specialized materials, modified assignments and testing, an alternative grading system and peer tutoring. A number of staff stated that R. M. often relies on peers or "buddies" to do work for him, therefore all service providers are working toward reducing some of his supports and making R. M. more independent.

III. ISSUE NO. 2

A. STATEMENT OF THE ISSUE

The second issue investigated was whether or not the district violated the Act by failing to provide students with disabilities within its jurisdiction a free appropriate public education, including social work services and homebound instruction as an alternative to appropriate education, as alleged by the following:

1. Students with disabilities who require social work services at Emerson Junior High School are not receiving such services; and

2. The district places SIED students into homebound instruction for months without intervention or with minimal tutorial assistance.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16) (17) (18) and (20), and 1414.

34 C.F.R. 300.2, 300.4, 300.11, 300.14, 300.121, 300.130, 300.180, 300.235, 300.300, and 300.342 - 300.346.

State Plan, Section V. E., X. A.

C. FINDINGS

1. Pursuant to the Act, students with disabilities who are unable to receive reasonable benefit from regular education are entitled to special education and related services tailored to meet their individual needs and designed to provide them with reasonable benefit from their education program.

2. The related services to which a student with disabilities is entitled are those required to assist the child to benefit from special education.

3. Among the specifically recognized related services under the Act are social work services. They are defined in the regulations as follows:
   (i) Preparing a social or developmental history on a child with a disability,
   (ii) Group and individual counseling with the child and family,
   (iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and
   (iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program
   20 U.S.C. 1401(17), and 34 C.F.R. 300.16(12).

4. A student with disabilities is entitled to social work services, as defined, if, in the opinion of the IEP team developing the IEP for the student, social work services are required to assist the student to benefit from special education.

5. It is alleged that the district does not provide social work services at Emerson Junior High School as a related service for those students whose IEP teams identify social work as required by the student to benefit from education. However, there has been no evidence to support this allegation submitted by complainant.

6. The district reported that of 696 students and Emerson Junior High, 113 have disabilities and current IEPs. Of the 113, 39 students are receiving social work services. A review of IEPs corroborates this information with social work indicated as a related service and/or a characteristic of service.

7. It is alleged that the district places SIED students into homebound instruction for months without intervention or with minimal tutorial assistance. However, there has been no evidence to support this allegation submitted by complainant nor has the investigation uncovered evidence to support complainant's assertion. Interviews with three persons whose names were provided by the complainant indicated their knowledge of past delays in the provision of special education services that have now been rectified, however there is no current evidence to support the allegation of a pattern and practice. for a class of students. This is not to say that there was no basis for each of the three individual concerns

8. The district reported that during the Fall of 1992, five SIED students were receiving services through a homebound delivery system. All of these five students were provided with tutoring, with amount of time ranging from 6 to 22 hours.

IV. CONCLUSIONS

1. The district does provide social work services for students with disabilities at Emerson Junior High School and does not place SIED students into homebound instruction without intervention or with minimal tutorial assistance, therefore it is not in violation of the Act with regard to these allegations.

2. The district does (a) provide a job coach for J. A., (b) provide adaptive physical education for R. M., (c) provide supported integrated services for R. M., and (d) did not unilaterally change the amount of services provided pursuant to the IEP of J. A. therefore it is not in violation of the Act with regard to these allegations.

3. By their own admission, however, the district does not comply with the Act's requirement regarding the provision of a free appropriate public education regarding R. M. and J. A., specifically by not providing (a) specific services for R. M. relating to identified needs, (b) transportation as a related service for R. M., and (c) adaptive physical education for J. A.

V. REMEDIAL ACTIONS

1. On or before January 18, 1993, the district must reconvene the IEP committee for R. M. to (a) determine the services to be provided to meet the need for supervision and assistance with eating, toileting, getting him to adaptive physical education and helping him to exit the building during a fire drill when the elevator cannot be utilized, which are identified by the districts own IEP team and to (b) clarify the circumstances under which special school transportation will be provided, the need for which has been determined by the districts own IEP team.

2. On or before January 25, 1993, the district must clarify the procedures for acquiring appropriate transportation services as a related service, to allow students to participate in the community based intervention (CBI) program. Such procedures must be in writing and distributed to the CBI service providers.

3. On or before January 25, 1993, the district must provide to R. M. those services decided above (V. 1. a and b) by it own IEP team.

4. On or before January 15, 1993, the district will provide adaptive physical education to J. A. in accordance with his IEP.

5. On or before January 18, 1993, the district must reconvene the IEP committee for J. A. to determine if additional APE services should be provided to compensate for those not provided between 9/30/92 and 1/15/92.

6. On or before February 1, 1993, the district must initiate the provision of any compensatory services to J. A. determined by its own IEP team.

7. On or before February 1, 1993, the district must submit to the Department a copy of R. M.'s IEP resulting from the meeting, a daily schedule for R. M., a copy of the written procedures for obtaining transportation for CBI activities, a copy of the IEP for J. A. and a daily schedule for J. A. which indicates time in adaptive physical education.

VI. RECOMMENDATIONS

It. is clear that those special education service providers interviewed are committed to the provision of services to meets the needs of R. M. and J. A. It is also clear that the IEPs, although they are very specific relative to needs, are not specific as to services to be provided to meet those needs. It is recommended that the district provide inservice training to their IEP facilitators on the need for specificity in determination of services to be provided. The Colorado Department of Education will assist with this if requested.

Dated this 22th day of December, 1992

Cheryl M. Karstaedt, Federal Complaints Coordinator